REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA,

AT

THE DECEMBER TERM, 1893, AND THE MARCH AND JUNE TERMS, 1894.

BY

FLETCHER MADDOX,
REPORTER.

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JUDGES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

Hon. WILLIAM Y. PEMBERTON, Chief Justice.

Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT, }

OFFICERS OF THE COURT.

HENRI J. HASKELL, Attorney General.

BENJAMIN WEBSTER, Clerk.

FLETCHER MADDOX, Reporter.

ATTORNEYS AND COUNSELORS AT LAW.

ADMITTED FROM SEPTEMBER 13, 1894, TO DECEMBER 31, 1894.

BEACH, EMORY V.
BENDER, JOHN O.
BRAZELTON, JOHN F.
COOMBE, ROBERT
CRULL, ELDORN J.
CULLEN, W. E., JR.
EVANS, L. ORVIS
GRINDROD, EDWARD
HARDESTY, JESSE
HATHHORN, FRED. H.
HAYWARD, ARTHUR P.
JACKSON, EVAN O.
KENNEDY, EDWARD B.
KIRK, JOHN W.
LEEHY, MAURICE D.
NASH, FRANK N.
PIERSON, GEORGE W.
RECTOR, CHARLES H.
SANNER, SYDNEY
STEBBINS, CHARLES H.

JUDGES AND JUDICIAL DISTRICTS.

The First Judicial District embraces the County of Lewis and Clarke; WILLIAM H. HUNT and HORACE R. BUCK, Judges; residing at Helena.

The Second Judicial District embraces the County of Silver Bow; JOHN J. MCHATTON and WILLIAM O. SPEER, Judges; residing at Butte.

The Third Judicial District embraces the Counties of Deer Lodge and Granite; THEODORE BRANTLEY, Judge; residing at Deer Lodge.

The Fourth Judicial District embraces the Counties of Missoula and Ravalli; FRANK H. WOODY, Judge; residing at Missoula.

The Fifth Judicial District embraces the Counties of Beaverhead, Jefferson, and Madison; FRANK SHOWERS, Judge; residing at Boulder.

The Sixth Judicial District embraces the Counties of Park and Meagher; FRANK HENRY, Judge; residing at Livingston.

The Seventh Judicial District embraces the Counties of Yellowstone, Custer, and Dawson; GEORGE R. MILBURN, Judge; residing at Miles City.

The Eighth Judicial District embraces the County of Cascade; CHARLES H. BENTON, Judge; residing at Great Falls.

The Ninth Judicial District embraces the County of Gallatin; FRANK K. ARMSTRONG, Judge; residing at Bozeman.

The Tenth Judicial District embraces the Counties of Flathead, Teton, Choteau, Valley, and Fergus; DUDLEY DU BOSE, Judge; residing at Fort Benton.

TABLE OF CASES REPORTED.

TABLE OF CASES CITED.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1893.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.

Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT, }

FINKELSTEIN, RESPONDENT, *v.* FINKELSTEIN, APPELLANT.

[Submitted December 20, 1893. Decided January 2, 1894.]

MARRIAGE AND DIVORCE—*Alimony pendente lite.*—A sufficient *prima facie* showing of marriage to support an order for alimony *pendente lite* is made where the plaintiff alleged a marriage with the defendant in Russia, and the birth of five children, and the defendant, while admitting the birth of four children as their lawful issue and long cohabitation, claimed that the marriage was invalid under the laws of that country; that plaintiff had been guilty of adultery, and that he had obtained a Mosaic divorce.

SAME—*Amount of alimony.*—Although defendant claimed that a large tailoring business, which he was alleged to own, belonged to another, the undisputed fact that he was conducting such a business is a sufficient showing of his ability to pay thirty dollars a month alimony and a counsel fee of fifty dollars.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for divorce. Plaintiff's application for alimony *pendente lite* was granted by BUCK, J. Affirmed.

McConnell, Clayberg & Gunn, for Appellant.

The affidavit of appellant is both evidence and a pleading in the nature of an answer, so far as the motion for alimony is concerned. The statement that the law of Russia prohibited the marriage of a minor is in the nature of a confession and avoidance. The statements that appellant was a minor, and that the person pretending to solemnize the rites of matrimony between respondent and himself was neither a magistrate, rabbi, priest, or minister, are allegations of fact, and should have been met by counter-affidavits if not true, and, in the absence of any such denial, must be taken as true. (*Collins* v. *Collins*, 71 N. Y. 274.) The relation of husband and wife must exist in order to warrant the granting of alimony. This needs no citation of authority. The right to support and maintenance arises only from the marital contract, hence if there is no marriage there can be no obligation to support. While it is true that where a marriage has been duly entered into, and solemnized, between parties who are incompetent at the time to make a contract of marriage, but who, after the removal of the disability, continue to cohabit together, such cohabitation will be regarded as a ratification of the previous marriage, and makes it good and valid from the beginning. This principle applies only to a case where the marriage is void for the want of ability of one, or both, of the parties to enter into the marriage contract. In such cases where the disability is removed the continued cohabitation shows that the consent has been given, or, rather, that the consent already given is ratified, and thus the marriage is made good. But where the marriage is in violation of positive law, no subsequent cohabitation or ratification can make such marriage good. The mere fact that the parties lived together as husband and wife, under a belief that the marriage was valid, does not help the case. (*Collins* v. *Collins*, 80 N. Y. 1; *Rose* v. *Rose*, 67 Mich. 619; *Goldbeck* v. *Goldbeck*, 18 N. J. Eq. 42.)

F. E. Stranahan, for Respondent.

I. A *prima facie* case of marriage *de facto*, or a cohabitation having the semblance of marriage, need only be made out

by the plaintiff to sustain the order for alimony *pendente lite*, and this *prima facie* case must be thoroughly defeated and the defense fully established by the husband, or putative husband, before he will be relieved. (*Brinkley* v. *Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460; *North* v. *North*, 1 Barb. Ch. 241; 43 Am. Dec. 778; *Portsmouth* v. *Portsmouth*, 3 Addams Eccl. 63; *Smith* v. *Smith*, 1 Edw. Ch. 255; *Hammond* v. *Hammond*, Clarke Ch. 153; *Smyth* v. *Smyth*, 2 Addams Eccl. 254; *Vincent* v. *Vincent*, 17 N. Y. Supp. 497; *Lea* v. *Lea*, 104 N. C. 603; 17 Am. St. Rep. 692; 1 Bishop on Marriage and Divorce, 386, 404.)

II. Supposing it to be admitted that the husband's version is correct, as to law and fact of the marriage in Poland, yet it will not be contended that the subsequent cohabitation was meretricious, or that the contracting parties did not do all they could to make the marriage legal, or that the disability was not removed in the state of New York, where the mutual present consent alone is necessary, and where they lived and cohabited as man and wife, and where children were born to them after the removal of the disability contended for. (1 Bishop on Marriage and Divorce, secs. 387, 970, 975, 980, 982, 985; *Starr* v. *Peck*, 1 Hill, 270; *Clayton* v. *Wardell*, 4 N. Y. 230; *Caujolle* v. *Ferrie*, 23 N. Y. 90; *O'Gara* v. *Eisenlohr*, 38 N. Y. 296; *Foster* v. *Hawley*, 8 Hun, 68; *Hynes* v. *McDermott*, 91 N. Y. 451; 43 Am. Rep. 677; *Peet* v. *Peet*, 52 Mich. 464.) The only act of disaffirmance was the sending to respondent by appellant the Mosaic divorce, thirteen years after the marriage, and when he, according to his own testimony, was twenty-nine years of age.

III. "There are practical reasons, yet not supported by much judicial authority, for holding the proofs of a fact of marriage less strict when the celebration was abroad than when in the country of the forum. And it has been deemed that the proof of a foreign law may be more easily dispensed with in proportion as it becomes difficult. Hence as marriage is specially favored, the courts may well relax the rules of proof when a foreign marriage is in litigation. (1 Bishop on Marriage and Divorce, sec. 1130; *Brower* v. *Bowers*, 1

Abb. App. Dec. 214; *Phillips* v. *Gregg*, 10 Watts, 158; 36 Am. Dec. 158.

IV. The appellant admitted the marriage by swearing to it before the police magistrate; by sending his wife the Mosaic divorce; and charging her with adultery by reason of his non-access at the time she conceived her last child. "And generally in our states, since confessions to a domestic marriage are admissible, so they are to a foreign." (1 Bishop on Marriage and Divorce, sec. 1127.)

V. A merchant or other person who holds no official situation, and who is unconnected with the legal profession, cannot be heard to expound the law of a foreign country, though the judge may be satisfied that he really possesses ample knowledge on the subject. (1 Bishop on Marriage and Divorce, sec. 1123.)

DE WITT, J.—This is an action for a divorce and alimony, and to set aside an alleged fraudulent conveyance of property by defendant, in order that plaintiff may realize alimony from such property. Defendant appeals from an order of the district court awarding plaintiff alimony *pendente lite*, and counsel fees. We refer to the case of *In re Finkelstein* v. *Curtis*, 13 Mont. 425, for a statement of some of the facts.

The appellant contends, on several grounds, that the order for alimony and counsel fees should be reversed. The first, which we will examine, is that it does not sufficiently appear, as counsel urges, that the respondent is the wife of said appellant. The plaintiff's motion for alimony and counsel fees was made upon the complaint and affidavits. The plaintiff alleges in her complaint that she and the defendant were married at Pultusk, in Russian Poland, December 27, 1870, and thereby became, and ever since have been, and now are, husband and wife. She further alleges that, at divers times between the last-mentioned date and the commencement of this action, the defendant has been guilty of adultery with one Sarah Eisbert, *alias* Sarah Jones, *alias* Sarah Finkelstein, a person with whom defendant purports to have intermarried in the year 1883.

The plaintiff further alleges that there are living issue of her marriage with the defendant, five children, ranging from

twenty-one years of age to twelve years. She further alleges that she is in indigent circumstances, dependent upon her labor for the support of herself and children, and that she is in ill health, and has no property whatever.

Her daughter, Esther, twenty-one years of age, makes an affidavit in which she says that ever since she can remember, with the exception of periodical desertions of her mother by her father, he, the defendant, has lived and cohabited with her mother as his wife, and has acknowledged and introduced her to the world at large as such. This daughter further sets forth the indigent circumstances of her mother.

In opposition to the motion, the defendant filed his own affidavit. He alleges that the relation of husband and wife has never existed between him and the plaintiff. He alleges that about the time that plaintiff says the marriage took place he and plaintiff appeared before a third person, who was not a magistrate, rabbi, priest, or minister, or any person authorized by the laws of Russia to perform a marriage ceremony, and that this third person presumed to pronounce plaintiff and defendant husband and wife. He further says that when this ceremony took place he was sixteen years of age, and that there was a law of Russia in force that no male person under the age of twenty-one years was allowed to marry, and that any such attempted marriage was absolutely void and invalid for all purposes.

Of course, one of the essential facts to plaintiff's cause of action, is that she is the wife of defendant. If that fact is not present, plaintiff has no case. But on the hearing of a motion for alimony *pendente lite*, it is not for the district court to finally determine that fact. The question is whether there is a sufficient *prima facie* showing of the alleged fact of marriage. In this case the plaintiff unequivocally alleges the fact of marriage with defendant in Russia in 1870, and that they ever since have been, and now are, husband and wife. She also alleges that there is issue of that marriage five children. The defendant admits that there are four children who are the issue of himself and plaintiff. So we have the undisputed fact of four children, and we also have the undisputed fact of a long cohabitation of plaintiff and this defendant as husband and

wife, interrupted only by defendant's periodical desertions of plaintiff. To oppose these allegations of plaintiff and these conceded facts, there is the affidavit of defendant, that the person who performed the alleged marriage ceremony in Russia was not authorized so to do by the laws of Russia, and that his alleged marriage when sixteen years of age was void and invalid under the laws of that country. The defendant contends that his affidavit in this respect must be held to be both a pleading and evidence. Taking his view, and looking at the affidavit as evidence, we have before us a statement of one not a lawyer as to what is the law of Russia. The statement of such a person is not competent testimony of what the law is in a foreign country. But appellant contends that his statement as to the law of Russia is not denied by plaintiff. We do not regard it as a matter of any consequence whether plaintiff denies it or not. She is not shown to be learned in the law and competent to testify any more than he is. Her denial would be of no more value than his asseveration. Neither of them is a witness competent upon the subject.

Turning from defendant's affidavit regarded as evidence, and looking at it as a pleading, as he requests, we observe this situation. The plaintiff alleges marriage and the present existence of the relation of husband and wife. The defendant sets up facts which he claims, if true, show that there was no marriage and no relation of husband and wife. In our opinion this leaves the matter of marriage simply in the condition of a contention between the parties. But there are some further allegations in defendant's affidavit, which instead of attacking plaintiff's claim that there was a marriage, rather lend strength to her contention. They are as follows: He says that in 1883 plaintiff and himself agreed to separate, and get a divorce in accordance with the Jewish religion and practice; that accordingly, he, the defendant, went to a rabbi in Chicago and obtained from him a divorce from the plaintiff according to the law of Moses, and that he sent the same to the plaintiff, and that she accepted and agreed to abide by it, and has abided by it for a period of ten years. So it appears that the defendant himself at that time fully recognized the relation of husband and wife between himself and the plaintiff. Again the defend-

ant, in his affidavit, in effect accuses the plaintiff of adultery, in that he says, that for more than eighteen months prior to the birth of plaintiff's last son, Emanuel, the defendant was continuously away from her in another city, and he says that he has never condoned this offense by the plaintiff. As a matter of course, she could not be guilty of adultery, as he charges in effect, unless the relation of husband and wife existed between the parties. So as above remarked, these matters set up by defendant, instead of lending aid to his contention against the marriage, have rather a tendency in the other direction.

It may be true that, if on a motion for alimony *pendente lite*, the defendant shows facts and conditions which absolutely establish that there is no marriage, and that plaintiff is not the wife of defendant, it would not be proper to grant such alimony. But there is no such showing in this case. To recapitulate, the district court had before it this situation: A direct allegation of marriage by the plaintiff, which the defendant denied, by alleging what he claimed was a law of Russia, which would render the alleged marriage void. There is the further fact of long cohabitation by plaintiff and defendant, as husband and wife, and the birth of four children as the result thereof. Again there is the action of defendant in obtaining the Mosaic divorce. Again there is the implied admission of the marriage by defendant in his charge against the plaintiff of adultery.

It is our opinion, that there was an ample *prima facie* showing upon which the district court was justified in granting the alimony and counsel fee.

Another point presented by the appellant is, that it does not appear that the defendant has the faculty and ability to pay alimony. It does appear that he is conducting a large tailoring business, and plaintiff claims that the business is, in fact, his own, and is being fraudulently conducted in the name of Sarah Finkelstein, the person defendant claims to be his wife. Defendant, on the other hand, says, that this business belongs to Sarah. But, in any event, it does appear, without contradiction, that the defendant is engaged in conducting this business, and, if he were able to do so, it is a fair showing that he has the faculty and ability to earn money to pay the mod-

erate sum allowed by the court in this case as alimony and counsel fees. The alimony was thirty dollars a month, and the counsel fee was fifty dollars.

There are some questions upon the statute of limitation as to plaintiff's cause of action, raised by defendant's affidavit; but with the substantial *prima facie* showing of a marriage, and the charges of adultery made by the defendant against this plaintiff, we are of opinion, that these questions as to the statute of limitations, which are simply alleged in defendant's affidavit, should properly be determined upon the trial of the case upon the merits, and should not be settled in advance upon the hearing of the application for alimony *pendente lite.*

The ruling of the district court is affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

MORRISON, RESPONDENT, v. MORRISON, APPELLANT.

[Submitted October 3, 1893. Decided January 2, 1894.]

MARRIAGE AND DIVORCE—*Special findings.*—Special findings may be properly submitted to and passed upon by the jury in a divorce suit, under section 275 of the Code of Civil Procedure.

SAME—*Habitual drunkenness and cruelty—Condonement.*—Habitual drunkenness, acts of violence, abuse, and frequent abandonment of a wife by her husband, during a period of several years preceding a final separation in January, 1889, are not condoned by a cohabitation together until October, 1888, when the defendant, shortly before the commencement of an action for divorce in April, 1889, while intoxicated had broke into plaintiff's house, armed with a pistol, and threatening to kill her drove her to seek refuge with a neighbor.

SAME—*Evidence—Neglect to support.*—While neglect of a husband to support his wife is not a ground for divorce in this state, such neglect may be proved in an action for divorce sought upon the grounds of habitual drunkenness and extreme cruelty, when confined to showing the tenor of defendant's conduct towards his wife.

Appeal from Second Judicial District, Silver Bow County.

ACTION for divorce. Decree was rendered for the plaintiff below by PEMBERTON, J. Affirmed.

Thompson Campbell, for Appellant.

J. S. Shropshire, for Respondent.

HARWOOD, J.—Plaintiff sought and obtained a divorce from the bonds of matrimony existing between herself and defendant; and also the custody of four infant children of said marriage, ranging in age from two to eight years, together with alimony and costs of suit.

The grounds alleged for such divorce are, habitual drunkenness on the part of defendant for a period of more than one year immediately prior to the commencement of the action; and extreme cruelty in the treatment of plaintiff by defendant through his threats of violence toward her; and false accusations charging her with infidelity to her marriage vows, all of which is particularly alleged. And by reason thereof plaintiff alleges that she has suffered great mental and physical distress; that her health has been greatly injured, her happiness and peace of mind destroyed, and that her personal safety in longer living with defendant in the bonds of matrimony is endangered. Wherefore her prayer for divorce therefrom and alimony and costs of suit.

Plaintiff's allegations were put in issue by defendant's answer, and the court proceeded to try the cause with a jury, the result of which was a finding in favor of plaintiff by both general and special verdict. Whereupon judgment was entered dissolving the bonds of matrimony existing between plaintiff and defendant, and awarding plaintiff the sole care and custody of said infant children, and alimony for counsel fees in the sum of two hundred and fifty dollars; and it having been made to appear that defendant was the owner of one hundred thousand shares of capital stock of the "Golden Gate Mining Company," a corporation organized and existing under the laws of the state of Montana, it was decreed that defendant should transfer and deliver to plaintiff fifty thousand shares of said capital stock, as permanent alimony, to be used by plaintiff toward the support and education of said children.

Defendant prosecuted this appeal from the judgment, and from an order overruling his motion for a new trial, but presents no brief of points and authorities relied upon to obtain a reversal of the conclusion reached by the court below. The statement of the case on motion for new trial, however, contains certain specifications of alleged errors and irregularities.

1. It is specified that "the court erred in permitting the jury to pass on special findings presented to them in this case, the verdict of the jury should have been general." It appears from the record that the jury returned a general verdict in favor of plaintiff, but also returned special findings on several propositions submitted. There is no statute forbidding special findings in such a case, nor has appellant cited any authority to support his contention. Moreover, the statute of this state provides for submission of special findings to be returned by the jury (Code Civ. Proc., § 275), and there is no exception made as to divorce suits. Indeed, the divorce statute provides that the same rules of proceeding shall prevail "as in other cases in chancery"; and special verdicts are common in chancery practice. We find no merit in the first specification.

Nor is there any logical coherency in specifying that the court erred in allowing the jury to return any thing more than a general verdict, and, secondly, specifying that the general verdict in favor of plaintiff ought to be vacated because the jury did not answer all the special questions propounded. In the second specification it is argumentatively urged that the general verdict should be set aside, because the jury did not find whether or not plaintiff and defendant cohabited together up to the 1st of October, 1888; that if the parties cohabited together up to that time it would manifest condonation. The jury did not so find, and there is no ground for claiming forgiveness or condonation of any of defendant's offenses against his marriage vows alleged in this case. The history of his conduct toward plaintiff, as shown by the evidence, is that of continued drunkenness, acts of violence, false accusations, threats, and abuse of plaintiff for several years past during their residence about mining camps in this state; with frequent abandonment of plaintiff and said children for considerable periods of time, and final separation in January, 1889, followed by this suit for divorce instituted by the wife in April, 1889. And, as appears from the evidence in the record, defendant continued his habits of drunkenness, as well as his acts of cruelty towards plaintiff, up to near the time of commencing this suit; and the same seems, from the evidence, to have increased in intensity and aggravation, rather than to have abated

in any degree, as time went on. Shortly before commencement of this suit plaintiff was driven from her house by defendant's last visit, when he broke in the door, armed with a pistol, threatening to kill plaintiff. He was then in an intoxicated condition. Plaintiff sought refuge and a hiding-place in a neighbor's house, to escape from the abuse and threatened assault, and injury by defendant, which plaintiff testified she feared. There is no ground to claim condonement under the facts shown in this case.

The third specification is to the effect that the court erred in allowing proof of defendant's neglect to provide necessaries for the support of plaintiff, but left her and said children destitute thereof, and thereby cast upon her the whole burden of the care and support of said children. It appears that plaintiff was without means of support, and that she maintained herself and said children by employment at teaching school and otherwise. Objection was made to the introduction of this evidence on the ground that such neglect is not made by statute cause for divorce in this state. The evidence of defendant's delinquency in this respect appears to have been admitted to throw light upon his conduct toward plaintiff, alleged in the pleadings and supported by proof, and not as ground of divorce; for the court instructed the jury that "neglect or refusal of defendant to support plaintiff is not ground of divorce under the laws of this state." And, by the observations of the court when that testimony was admitted, it was to be confined to showing the general tenor of defendant's conduct toward plaintiff. And thus confined by the observations of the court, when that testimony was admitted and also curtailed in its effect by the instruction mentioned, we think there was no error in admitting the proof of such delinquency on defendant's part. The duty to support the wife and child as comfortably, and according to their station in life, or as comfortably as the husbond is able to provide, is not the least among the duties assumed by him in the marriage bond. Possibly, however, in this case, it was the least among defendant's offenses against his marital duties. Neglect to support the wife, although not ground for divorce here, is made so by statute in several states, thus showing that it is considered an offense of no light

character, where the wife is without means for maintenance; and we think proof of such neglect, confined, as it was in this case, to an interpretation of defendant's other conduct and disposition towards plaintiff, was not error, especially where the record shows that the case was fully made out on other grounds.

The other specifications go to the point that the evidence is insufficient to support the verdict. The jury in the court below found the contrary, and the record shows abundant support for that view. The order denying a new trial and the judgment is therefore affirmed with costs.

Affirmed.

DE WITT, J., having been counsel for one of the parties in the commencement of this case, did not engage in the foregoing consideration.

PEMBERTON, C. J., concurs.

STATE EX REL. BENTON v. BAUM.

[Submitted January 26, 1893. Decided January 2, 1894.]

ATTORNEYS—*Disbarment.*—Where an attorney made an agreement to try a case for his client in the justice court for $25, and another to try it in the district court for $25, and a third to appeal it to the supreme court for $25, which several amounts he received, performing only the first two services and deliberately neglecting to take the appeal, and during the time within which he might have appealed procured and converted $23 which had been paid into court for his client on the judgment from which he agreed to appeal; and also opened a letter addressed to another client, which had been sent in his care, containing a check for $100, upon which he indorsed his client's name, and procured the money, which he refused to pay over upon demand, although having no claim or lien upon it for fees or otherwise—such conduct is ground for disbarment under sections 106, 107, 5th division of the Compiled Statutes vesting the supreme court with power, in its discretion, to disbar an attorney for malconduct in his profession, and also for refusing, upon demand, to pay over money to which his client is entitled.

APPLICATION for the disbarment of an attorney. Granted.

DE WITT, J.—This is an application for the disbarment of Peter M. Baum, an attorney of this court. The relator, Charles H. Benton, judge of the eighth judicial district court, filed, in this court, written charges against said Baum. An

order was issued that respondent show cause why his license should not be revoked, and his name stricken from the roll of attorneys. Upon service of that order, Mr. Baum filed an answer. The matter was thereupon referred to E. R. Russel, Esq., of Great Falls, who was appointed by this court as referee, with the usual powers of such officer, to take the testimony of witnesses and report the same to us. That report is now before us. We will examine it, and ascertain whether the charges were proved, and whether they are sufficient upon which to pronounce a judgment disbarring respondent from the practice of law.

We will give our attention to only two of the charges. The first may be stated as follows: Joseph Horn employed Baum to prosecute an action for him, in a justice court, against one James Baatz, on a claim amounting to $71.50. The price agreed upon for the service was $25, which amount Horn paid to Baum. The service was performed, and judgment was rendered in the justice court for $60 in favor of Horn. Baatz appealed to the district court. Thereupon Baum and Horn made a second agreement that Baum should try the case in the district court for another $25. This amount was also paid by Horn to Baum. In the district court, Horn obtained a judgment against Baatz for $30. Thereupon a third contract was made between Horn and Baum, by which Baum agreed to appeal the case, and argue it in the supreme court, for another $25. This money was paid by Horn, and accepted by Baum. Baum did not appeal the case to the supreme court, but allowed the time for so doing to expire. Judgment for costs was entered against Horn in the district court by reason of the fact that the judgment of the justice of the peace was reduced on the trial *de novo* in the district court. The sheriff collected this judgment for costs from Horn. The defendant, Baatz, against whom was the judgment for $30 in the district court, paid that amount of money into court in satisfaction. Baum, as Horn's attorney, received this $30 from the clerk of the district court, less $7 costs, which belonged to the justice of the peace. This $23, so received by Baum, he retained, and converted to his own use.

The second charge is as follows: One Robert Temple was

arrested, charged with perjury. He employed Baum to defend him. While he was in jail he paid Baum $20, and, after being released on bail, he paid him a further sum of $30 as a retainer. Temple wrote to a relative in Washington, D. C., asking for money, and directing the relative to send the letter in care of the law firm of which Baum was a member. This letter was sent, containing a check for $100, payable to Temple. This letter was by Baum opened. Baum took the check, $100, and indorsed it, "R. Temple, per Peter M. Baum," and "Peter M. Baum." He cashed this check at a Great Falls bank, and retained the money. Temple gave Baum no authority to open his letter, or to take his check or indorse it, or to receive money on it. Temple, discovering what Baum had done, discharged him from his service, and demanded the $100, which was refused. We do not deem it necessary to notice the other charges made in the complaint.

At the hearing before the referee, Mr. Baum appeared in person, and was present at every session, the referee never proceeding with testimony until Baum appeared. Baum was not only afforded a full cross-examination of the witnesses for the state, but he was permitted to revile the witnesses and counsel, to insult the referee, to ridicule the proceedings, to challenge persons to fight, and to indulge generally in such disgraceful conduct that we much regret that the referee did not stop the hearing, and at once certify to us the acts which were taking place before him, for the referee was a part of this court, and Baum's offenses against the referee were offenses against the court. (*In re Haldorn*, 10 Mont. 222.)

Perhaps it may not be amiss to note a few examples of Baum's conduct. Early in the proceedings Mr. Baum remarks "that he does not care any thing for the people who appear in this proceeding; that he defies them, and defies the supreme court to do him any harm in this case; and that nothing can be proved. I say that Ed L. Bishop never made a cent in this country until I took him into business. I took him into my office a pauper. That he don't know enough to chew gum, and has cheated me every time he has had a chance."

Again, Baum remarks: "Mr. Baum asks now that you

bring in the court clown." Again, Baum says to one of the counsel: "You stole the balance of my money. If I was the biggest coward on earth, I would knock out the man that said that to me." At another point we have the following: "Here Mr. Baum noticed W. M. Cockrill, clerk of the district court of Cascade county, standing in the door of the referee's office, and said to him, 'Come in William and see the circus.'" Mr. Baum, in objecting to a question does it as follows: *Mr. Baum.* Mr. Baum says that that question is leading, and outrageous, and ridiculous, and nobody but a fool would ask such a question. I say that to the supreme court, and also say that Mr. Baum says it is directory." Again, commenting upon a question, he says: "Who ever heard of a lawyer asking a question that way. Just say now, also, that if Mr. Bishop was a gentleman, and born south of Mason and Dixon's line, he would have licked Mr. Baum before this time." Speaking of himself, Baum again says: "We will see. Counsel may be drunk, but I would rather have his head drunk than yours sober. We will have a circus before we get through." Mr. Baum remarks to one of the counsel as follows: "Relating to this check: Bishop, if you had my head, drunk, it would be worth millions of dollars to you." At another time Mr. Baum says: "Old man —— [naming one of the members of this court] will be amused when he sees this." Addressing Mr. Cockrill, a bystander, Mr. Baum says: "Sit down before I lick you, Cockrill." Mr. Horn, a German, being upon the stand as a witness, Mr. Baum remarks: "Oh, a Dutchman will do any thing, you know. I wish you would say to the supreme court that I would like to have such a thing as that Bishop out in a green field. I believe the crows would be scared." Again Mr. Baum remarks to one of the counsel: "I would like to have you put down that, now. Baum now says he would like to take Bishop out, and slap his face; that I think he is the laziest darn dog that was ever born. I now say that Pop Baum took him into his office when he had n't any reputation or business, and let him make money, and that all the money he ever got, and all the reputation he ever had, he got through Pop Baum. Pop Baum made every thing there is in him." Speaking of the same German witness above noted, Baum

remarks: "I think he lies about that." The following is one of Mr. Baum's methods of objecting to a question: "Objected to upon the ground that Bishop is a fool. I want to show the supreme court what a fool you are, you dirty loafer." To the witness he says, "Pull off your shoes, and wash your feet. Now, you keep your mouth shut, and don't tell him a damn thing." To punish Baum for this conduct before the referee is now impracticable (further than the judgment disbarring him) as he absconded from this state about the time the evidence for the state in this proceeding was closed.

The two charges above recited were clearly and amply proved by the witnesses for the state. We will examine the Horn matter for a moment. It is proved beyond a cavil that there were three express and well-understood contracts between Horn and Baum—one contract to try the case in the justice court for $25; another, to try it in the district court for $25; and the third, to appeal and try it in the supreme court for $25. These several amounts were all paid to Baum. He performed the first two services. He was paid to appeal the case to the supreme court. He did not forget to take the appeal. He deliberately did not do it, but, on the other hand, did something else; that is to say, during the time within which he might have appealed, he went to the clerk's office and collected $23 which had been paid into court for his client on the judgment from which he had agreed to appeal. This $23 he appropriated and converted. So he not only deliberately and knowingly omitted to do that which he had agreed to do, and had been paid for doing, but he also converted a sum of money belonging to his client. There is no pretense, by the mouth of any witness, that Baum had, or ever made or pretended to have, any claim upon this $23 for fees owing from Horn. In Baum's cross-examination of Horn he tries to make it seem unreasonable and ridiculous that an attorney would agree to take a case to the supreme court for $25, and that therefore it must be untrue that he agreed to do it. It may be unreasonable to believe that an attorney would attempt such a service, paying costs, transcribing, printing, and expenses, for $25. But Baum did not attempt the service. The evidence does not show that he ever intended to take the appeal,

but it does show that he intended to promise to do it, and that he intended to get the $25 for the promise, and intended to give no further consideration for that money than the promise. So much for the Horn matter.

We will look at the Temple charge. Here the evidence is just as clear. It is established that Peter M. Baum opened Robert Temple's letter; that he took therefrom Temple's check for $100; that he indorsed Temple's name, and collected Temple's money, and put it into his pocket—and all this without permission or authority, expressed or implied. There is no pretense here that, even if Baum had obtained possession of this money lawfully, he had any right or claim or lien upon it, for fees or otherwise. Upon the last day that evidence was taken Mr. Baum was present, as he was at every hearing. An adjournment was taken to March 4, 1893, at 10 A. M. Adjournments were taken as follows: To the same day at 2 P. M.; to March 13th, 10 A. M.; to March 27th, 10 A. M.; to April 19th, 10 A. M. At none of these hearings did Baum appear. The referee then closed the hearing. Mr. Baum did not offer a syllable of proof, by himself or any other witness, in contradiction of the charges and testimony of the state.

As above noticed, he has left this jurisdiction. We have held the report of the referee from the date of its filing, May 23d, until this time, January 2, 1894, so that respondent should have ample opportunity to make a defense. After the filing of the complaint in this matter, and pending the proceeding, Baum's conduct towards Judge Benton was such as was utterly unbecoming an attorney. About the time the hearings before the referee were being continued from day to day, awaiting Baum's presence, some further affidavits were filed in this court setting forth Baum's conduct. Although evidence was not taken upon these charges, the affidavits were made by respectable persons of Great Falls, and Baum has never appeared to controvert the charges therein contained. It may therefore be proper to refer to them in connection with the other matter above reviewed. It is set forth that Baum, in the presence of several persons, stated that Judge Benton was a hypocritical —— —— ——, and ought to be impeached; that he (Baum) owned the court (referring to Judge Benton); and that "Charley Benton

is afraid of me [Baum], and will do what I want him to." Another affiant alleges that Baum, on the streets of Great Falls, in the presence of a number of persons, stated that he had been running the judge of the district court for a year or so, and that the judge did whatever he (Baum) desired him, regarding litigation in which he was interested, and that the judge was all right while he was under Baum's control. The other charges in these affidavits are as to personal abuse by Baum of Benton, and some of it in Benton's chambers at the courthouse. The conduct described must have sorely taxed the judicial calm of Judge Benton, and made him wish, for the time, that he were a citizen only, and not a judge of the court. The charges in these affidavits can add nothing to the severity of the judgment of this court. They only further show the abyss of degradation into which the respondent has fallen. We have shown what the charges against Peter M. Baum are. We have shown that they were proved. We have shown what Baum's conduct was in the presence of the referee, and his conduct pending those proceedings.

We have the following statute: "In all cases where an attorney of any court of this state, or solicitor in chancery, shall have received, or may hereafter receive, in his said office of attorney or solicitor, in the course of collection or settlement, any money or other property belonging to any client, and shall, upon demand made, and a tender of his reasonable fees and expenses, refuse or neglect to pay over or deliver the same to the said client, or to any person duly authorized to receive the same, it shall be lawful for any person interested to apply to the supreme court of this state for a rule upon the said attorney or solicitor to show cause, at a time to be fixed by the said court, why the name of said attorney or solicitor should not be stricken from the roll, a copy of which rule shall be duly served on said attorney or solicitor at least ten days previous to the day upon which said rule shall be made returnable; and if, upon said rule, it shall be made to appear to the said court that such attorney or solicitor has improperly neglected or refused to pay over or deliver said money or property so demanded as aforesaid, it shall be the duty of said court to direct that the name of said attorney or solicitor be stricken from

the roll of attorneys in said court." (Comp. Stats., div. 5, p. 621, § 107.) We also have a provision, in section 106, that the justices of the supreme court, in open court, shall have power, in their discretion, to erase the name of an attorney or counselor at law from the roll for malconduct in his profession. Section 107 is sufficient to sustain a judgment disbarring Baum. We are of opinion that section 106 is also ample authority. Baum's acts were "malconduct in his profession." It would be undignified for a court to stop to discuss whether Baum's acts, as above described, were professional malconduct. He shocks professional ethics and all common morals. The standard of morals in the profession of law ought to be at a high mark. Mr. Baum was once very near expulsion from that profession (July term of this court, 1890). At that time he was saved by the view that we took of the courtesy which seemed to be due from us to the supreme court of the state of New York. (*In re Baum*, 10 Mont. 223.) The offenses charged against him at that time were committed in the state of New York, and it seemed that the New York supreme court had jurisdiction, and had taken proceedings against Baum, which were then pending and undetermined. On that ground we then omitted to take action.

Furthermore, perhaps it is not amiss to state that this court was then addressed in behalf of Mr. Baum by gentlemen of the bench and bar in high standing in sister states. Mr. Baum was by us given the opportunity to secure an honorable place in his profession in a rapidly developing community, and among a generous people. It is characteristic of the people of the west to forgive the past, and to give the helping hand of fellowship to every struggler for a larger day and better life. Mr. Baum has flagrantly abused this sentiment of the court and the people of this state. It is the judgment of this court that the license, as an attorney, of Peter M. Baum, is revoked, and that his name be stricken from the roll of attorneys of this court, and that he is debarred from practicing in any of the courts of this state, or from exercising any of the privileges of an attorney or counselor of law.

PEMBERTON, C. J., and HARWOOD, J., concur.

DALY, RESPONDENT, v. MILEN ET AL., APPELLANTS.

[Submitted February 6, 1893. Decided January 15, 1894.]

JUDGMENT—*Special findings—Inconsistency.*—When the jury, in an action to enjoin the collection of a judgment, found specially that the note upon which such judgment was rendered had not been settled pending the suit, and that defendant had not agreed to dismiss such action, which findings were adopted by the court, a judgment for plaintiff will be reversed on appeal as inconsistent with and unauthorized by the findings.

Appeal from Seventh Judicial District, Custer County.

ACTION to enjoin collection of, and to vacate, a judgment. The cause was tried before MILBURN, J., who rendered judgment for plaintiff. Reversed.

Middleton & Light, for Appellant.

T. H. Porter, and *C. H. Loud*, for Respondent.

PEMBERTON, C. J.—The plaintiff alleges in his complaint that on the twentieth day of July, 1888, the defendant Milen began a suit in the district court of Custer county against him (plaintiff) to recover judgment on a promissory note given by plaintiff to said defendant, in the sum of five hundred and seventy-four dollars, with interest at twelve per cent from October 30, 1887; that summons was issued in said suit and served on plaintiff; that on the twenty-first day of May, 1889, and while said suit was still pending in said court, the plaintiff and said defendant had a settlement of all demands and accounts existing between them, including the amount and the note on which this said suit was brought; that thereupon, and in consideration of said settlement, said defendant Milen and his attorney agreed to dismiss said suit at the costs of said Milen, but that, instead of dismissing said suit, said defendant Milen's attorney, on the twenty-second day of May, 1889, caused and procured judgment to be entered in said court in said action in the sum of six hundred and seventy-nine dollars, with interest and costs, against this plaintiff, in violation of his rights and of the terms of said settlement; that said judgment was entered of record in said court, and still remains of record therein; that plaintiff had no knowledge of

said judgment having been obtained and entered, as aforesaid, until execution issued thereon was levied on his property by the sheriff; that defendant E. J. Jones is the sheriff; that said sheriff has levied said execution upon two thousand four hundred sheep belonging to plaintiff, and has taken them into his possession thereunder, and threatens to remove them, etc. Plaintiff therefore brings this suit, and asks judgment that the defendants be enjoined from taking and selling said property under said execution; that said execution and judgment of the district court be vacated, and declared null and void; that his property be restored; and for costs, etc. All the material allegations of the complaint are denied by the answer of the defendant. The case was tried by the court with a jury. A number of special findings of fact were submitted to the jury. These special findings of fact were made and returned in favor of the defendants. The jury also returned a general verdict in favor of the defendants. The plaintiff thereupon filed a motion to set aside the special findings of fact and the general verdict of the jury in favor of defendants, and for judgment in favor of the plaintiff. On the hearing of this motion the court set aside the general verdict of the jury, adopted the special findings of fact, and rendered judgment in favor of the plaintiff in accordance with the prayer of his complaint. From this judgment defendants appeal.

The main issue in the trial of this cause was this: Was the note on which judgment was rendered in the district court on the twenty-second day of May, 1889, in favor of defendant Milen, and against the plaintiff in this action, included in and settled in the settlement had between the said parties on the twenty-first day of May, 1889, as alleged in the complaint, and was it agreed at the time of said settlement that said suit should be dismissed by said defendant Milen? This issue was submitted to the jury in special findings Nos. 7 and 8. They found in favor of the defendants, as will be seen by the interrogatories Nos. 7 and 8, and the answers thereto, which are as follows:

"7. Was there ever any stipulation made or signed by the parties to this action, or their attorneys, to dismiss the action which was pending in this district court on the twenty-first

day of May, 1889, in which Milen was plaintiff, and Daly was defendant? Answer. No. Jesse Haston, Foreman.

"8. Was there any oral agreement May 21, 1889, to dismiss the case in the district court? Answer. No. Jesse Haston, Foreman."

The court approved and adopted these findings, as well as others, and included them in the judgment rendered in this case. To authorize the court to render a judgment vacating and restraining the enforcement of the judgment in controversy as null and void it was necessary that it should be shown and found as a fact that the note on which said judgment was rendered had been paid and settled in the settlement of May 21, 1889, between the parties to this suit. But the finding was the other way, both by the jury and the court. Before the court could hold the attacked judgment null and void, order it vacated, and enjoin its enforcement, it must have been shown, as a *sine qua non*, that it had been paid, or that the claim on which it was recovered had been paid before its rendition, as is the contention in this case.

The respondent moves this court to strike the evidence which accompanies the record therefrom, for the reason that it was not properly made a part of the record—that it was not made a part of the record within the time, or in the manner, provided by law. This same motion was made in the lower court, and was overruled *pro forma*. This motion was not proper in the lower court. If the evidence was not properly made a part of the record on appeal for any cause, the respondent had the right to have the record show this, with his objections, and the lower court to properly certify thereto. Then, when the case was filed in this court, his motion to strike out would have been proper, for the reasons shown in the record, and certified to by the trial court. But this is an appeal from the judgment. It is only necessary for the determination of this case to examine the judgment-roll, which is brought here by an appeal from the judgment. The findings of fact by the jury are a part of the judgment-roll (Code Civ. Proc., § 306), and the court adopts these findings, and incorporates them into judgment appealed from. We think the findings of fact so incorporated in the judgment are inconsistent with, and an-

tagonistical to, the judgment. In truth, the findings of fact do not authorize or support the judgment.

The judgment is therefore reversed, and the cause remanded for a new trial.

Reversed.

HARWOOD and DE WITT, JJ., concur.

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PARROTT, RESPONDENT, v. KANE ET AL., APPELLANTS.

[Submitted October 26, 1893. Decided January 15, 1894.

JUDGMENTS—*Entry—Appeal bond—Defense of sureties.*—An objection by the sureties on an appeal bond, that the judgment from which the appeal was taken had never been entered, and that the bond was therefore void, comes too late when urged for the first time in defense to an action upon the bond, where the bond recited an entry of the judgment, which was affirmed on appeal after counsel for both sides had appeared, no motion having been made to dismiss the appeal as premature, and the execution of the judgment had been stayed for over two years by virtue of such appeal bond.

SURETIES—*Undertaking on appeal—Defenses.*—Sureties on a stay bond cannot maintain in bar to an action instituted by the plaintiff in ejectment to recover damages caused by a stay of execution of a judgment in his favor by virtue of such bond, that the damages occurred by reason of an order of the district court recalling a writ of restitution which it had issued upon a *remittitur* from this court affirming such judgment, and staying all proceedings thereunder, and which order was still in force, where the writ was stayed pending the action on the bond and not upon any grounds affecting the validity of the judgment.

Appeal from Third Judicial District, Deer Lodge County.

ACTION on appeal bond. Judgment was rendered for the plaintiff below by WOODY, J. Affirmed.

Cole & Whitehill, for Appellants.

I. As a general rule a surety may set up in an action against him any legal or equitable defense which would have been available to his principal, and may introduce any evidence tending to maintain such defense. He is not entitled to every exception which his principal may urge, but any thing which goes to the contract itself, such as fraud, violence, or whatever entirely avoids the obligation, he may plead. (Brandt on Suretyship, sec. 145; Baylies on Guarantees, p. 402, sec. 5;

1 Wait on Actions and Defenses, p. 700; *Jarratt* v. *Martin*, 70 N. C. 459; *Shreffler* v. *Nodelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 626.)

II. If no judgment were entered in the case of *Parrott* v. *Hungelburger*, there was no appeal, and this court was without jurisdiction to affirm or modify such judgment. An appeal taken in such case is abortive, and leaves the case in the court below as undisturbed as though no attempt at appeal had been made. The judgment of this court, made in said action on the fourteenth day of May, 1890, was absolutely void. There being then no affirmance of the judgment on appeal, the sureties were not liable, and they should have been allowed to make such defense. (Comp. Stats., div. 1, § 421, p. 174; *Rader* v. *Nottingham*, 2 Mont. 158; *Murphy* v. *King*, 6 Mont. 30; *Home of Inebriates* v. *Kaplan*, 84 Cal. 486; *McLaughlin* v. *Doherty*, 54 Cal. 519; *Thomas* v. *Anderson*, 55 Cal. 43; Haynes' New Trial and Appeal, sec. 183; Elliott's Appellate Procedure, § 19; Wells' Jurisdiction, § 10.) In this action the sureties are not estopped by the recital of the bond. There being no appeal, the statutory bond could not be given. The appeal being void, the bond also is void, unless it be good as a common-law bond. It is not a common-law bond, for there is no signature of the principal. The recital in the bond in this case, that the defendant was about to appeal "from a judgment made and entered against defendant and in favor of plaintiff," is not the recital of any act of these sureties. It is not pretended that they made and entered the judgment in the district court, or that they knew any thing whatever about such entry. A person is only estopped from denying his own acts, not the acts of another. (Brandt on Sureties, sec. 46; *Ney* v. *Orr*, 2 Mont. 559.) It was admitted in the pleadings that there was a stay of proceedings by order of the lower court, so that no execution could issue on the judgment against the defendant and appellant in the case of *Parrott* v. *Hungelburger*, 9 Mont. 526. It appears from the bond sued on in this action, that the defendant, Hungelburger, is the principal, and the defendants, Kane and McDevitt, are sureties. It also appears therefrom that the condition of the bond is that the appellant, Hungelburger, will pay the penalty thereof. The only liability of these defend-

ants, then, is upon the default of the principal, and, until an execution can be enforced in the original action, there can be no liability on the bond, and we contend that whatever defense the principal in the bond might have should also be available to the surety, and that the lower court erred in disallowing these appellants from making such defense. (*Parnell* v. *Hancock*, 48 Cal. 452; *Sharon* v. *Sharon*, 84 Cal. 434; *First Nat. Bank* v. *Rogers*, 13 Minn. 407; 97 Am. Dec. 239.)

Edward Scharnikow, and *Robinson & Stapleton*, for Respondents.

The instrument sued on in this case is a statutory undertaking, not a bond. It has no principal. The contract of the defendants is a separate one on their part. Its execution is admitted, and the new matter set up by the defendants constitutes no defense. The undertaking recites that the judgment was entered, which is a special recital, and the defendants are thereby estopped from asserting to the contrary. (Bigelow on Estoppel, 308–09; *Hill* v. *Burke*, 62 N. Y. 111–17; Brandt on Suretyship, §§ 42–44, 642; *McMillan* v. *Dana*, 18 Cal. 346; *Murdock* v. *Brooks*, 38 Cal. 600; *Hathaway* v. *Davis*, 33 Cal. 161; *De Castro* v. *Clarke*, 29 Cal. 14; *San Francisco* v. *Randall*, 54 Cal. 408; *Smith* v. *Fargo*, 57 Cal. 158; *Pierce* v. *Whiting*, 63 Cal. 538.) The foregoing authorities we think pretty well establish what we contend for, that appellants are estopped by the recital in the undertaking that the judgment of *Parrott* v. *Hungelburger*, 9 Mont. 526, was entered, from asserting the contrary. None of the authorities of appellants touch this question. That the judgment was not entered is the sole ground of complaint. This alone, and nothing more. If it is so, that whatever defense the principal could interpose the surety could. Had this been a bond, as it is not, and had Hungelburger signed it, which she did not, and with the recital it contains (that the judgment was entered), she would have been also estopped by such recital, and could not have been allowed to make the defense stricken out. The entry of the judgment would have been no part of this record on appeal. It was the judgment which was appealed from, and that judgment constituted part of the record, not its entry, and the

undertaking reciting the entry of the judgment gave the appellate court jurisdiction. Even did it not contain such recital, their defense would not be good. Their contract was to pay in a certain event, and that event occurred. (*Bullard* v. *Gillette*, 1 Mont. 510; *Babbitt* v. *Finn*, 101 U. S. 13; *Crane* v. *Weymouth*, 54 Cal. 476.)

DE WITT, J.—The plaintiff herein is the same person who was the plaintiff in the case of *Parrott* v. *Hungelburger*, reported in 9 Mont. 526. He brought this action against John Kane and another, who were sureties on the stay bond on the appeal of *Parrott* v. *Hungelburger*. See the report of that case for the facts therein. That action was in the nature of ejectment, judgment being for the plaintiff. The bond given by defendant thereon, on appeal, was that she would pay the value of the use and occupation of the premises, not exceeding five hundred dollars, pending the appeal. In this present action on that bond, plaintiff recovered judgment for five hundred dollars. The defendants appeal.

The complaint in this case sets up the fact of the judgment in the district court in *Parrott* v. *Hungelburger*, for the restitution and possession of the premises; also, the appeal by the defendant Hungelburger from the judgment, and the giving of the undertaking on appeal by the persons who are the defendants in the case at bar (which undertaking is set out in full as an exhibit to the complaint). The complaint further sets up the fact of the stay of proceedings by virtue of the undertaking, and the keeping of plaintiff out of possession of the premises; also, the fact of the affirmance of the judgment in *Parrott* v. *Hungelburger*, 9 Mont. 526, and the *remittitur* to the district court. The undertaking on appeal in *Parrott* v. *Hungelburger* recites as follows: "Whereas, the defendant in the above-entitled action is about to appeal to the supreme court of the territory of Montana from a judgment made and entered against defendant, and in favor of plaintiff, in said action, in said district court, on the thirtieth day of October, 1888, for the restitution of the premises described in the complaint, for damages, and for costs; and whereas, the appellant is desirous of staying the execution of said judgment so appealed from,

in so far as it relates to the possession of the land and premises described in the complaint." The undertaking then goes on to bind the sureties for the value of the rents and profits.

The defendants denied that in *Parrott* v. *Hungelburger*, 9 Mont. 526, any judgment was ever given, rendered, or entered in the district court in favor of plaintiff in that case. This denial was by the district court stricken from the answer, the court holding that defendants could not be heard to make it. Defendants contend that this was error. We will examine this contention.

Hungelburger died pending the appeal of *Parrott* v. *Hungelburger*, 9 Mont. 526, in this court, and Peter McDevitt, administrator, who is also a defendant in the present case, was substituted. It is not contended in argument by the appellants but that the judgment in *Parrott* v. *Hungelburger* was rendered, nor, as it appears, could it be so contended. In the record of that case, in this court, a copy of the judgment appears, formal in all respects, signed by the judge, and indorsed, "filed and entered October 30, 1888." But appellants say that, in fact, the judgment was not entered, and, if not entered, the appeal was premature and a void proceeding, and the undertaking given thereon was also void. Appellants urge that, therefore, on the trial below, they had the right to allege and prove that the judgment in *Parrott* v. *Hungelburger* had not been entered.

A distinction has been made between "rendering" and "entering" a judgment. That distinction is pointed out by Mr. Justice Sawyer in *Gray* v. *Palmer*, 28 Cal. 416. Rendering judgment is the judicial act of the court. Entering it is the ministerial act of the clerk. A judgment is a judgment when it is rendered. It is the rendering which makes it a judgment. The entering makes a record of the judgment which the court has rendered. (See, also, 1 Black on Judgments, § 106, and cases cited.)

As to the time for taking an appeal from a final judgment in an action commenced in the court in which the judgment is rendered, it is provided by our statute that it shall be taken "within one year after the entering of the judgment." (Code Civ. Proc., § 421.) Construing the same language as is used

in this section, the California supreme court has held that an appeal would, on motion, be dismissed, if taken before the entering of the judgment. (*Thomas* v. *Anderson*, 55 Cal. 43; *McLaughlin* v. *Dougherty*, 54 Cal. 519; Hayne's New Trial and Appeal, p. 549.) The appeals in these cases were held to be premature. There was no question but their subject matter was within the jurisdiction of the court, but it was held that they had been brought into court before the time provided by law. For this reason they were dismissed upon a motion made when the case came to the supreme court. But there is a very different state of facts in the case at bar. No motion to dismiss the appeal was ever made in *Parrott* v. *Hungelburger*, 9 Mont. 526. In fact, the persons now complaining of the entertaining of the appeal in that case are the persons who gave the stay bond on that appeal, which was so entertained. The appellants in this case stand in this position: They executed and filed their undertaking in *Parrott* v. *Hungelburger*, in which they solemnly recited that judgment had been made and entered in that case. That judgment was brought before this court for review. The clerk certified that it was the judgment in that case, and, furthermore, certified that judgment had been entered. Counsel for both sides appeared, and argued the appeal twice in this court. Not a suggestion was made by any one that the judgment had not been entered, and it is conceded all through the history of the case that the judgment was in fact rendered. After the decision in this court no motion for rehearing was made. The *remittitur* was sent to the district court, and filed therein. That *remittitur* was read in evidence on the trial of the case at bar. It was a record of this court, and became, by filing in the district court July 22, 1890, a record of that court in that case. It appears thereby, and therefore was in evidence on the trial of this case, that the judgment in *Parrott* v. *Hungelburger* was entered October 30, 1888. The decision of this court, affirming the judgment, was upon May 4, 1890. The defendant in *Parrott* v. *Hungelburger*, 9 Mont. 526, enjoyed the stay of proceedings from October 30, 1888, to November 28, 1890, at which time a writ of restitution was issued. The plaintiff in the case of *Parrott* v. *Hungelburger*, 9 Mont. 526, against whom the appeal was taken, never

asked to have it dismissed, and the defendant, Hungelburger, not only did not ask to have it dismissed, but was the active agent in bringing the appeal to this court, and having it heard. The consideration for the undertaking was the stay of proceedings. That consideration was received. The stay was had. After all this history of the proceedings, and when the plaintiff, who had been kept out of the possession for over two years by virtue of the appeal and the stay bond, asks to be made good for his damages, he is met with the objection for the first time that the judgment had not been entered. We are of opinion that the objection at this time comes too late.

The case of *Hill* v. *Burke*, 62 N. Y. 111, was an action upon an undertaking given upon appeal. The following remarks by the New York court of appeals, in deciding the case, are in point, both as to the facts and the conclusions: "The objections relate to the regularity of the appeal, and, I think, are not well founded. It appeared upon the trial, by the *remittitur* of the court of appeals which was introduced in evidence, and it is stated as a fact in the case that the *remittitur* showed, among other things, that an appeal was taken from the judgment of the general term of the supreme court, referred to in said undertaking, to the court of appeals, and that said judgment was duly affirmed by the court of appeals, with costs, and the proceedings duly remitted to the court below. This was, I think, conclusive evidence that an appeal had been taken by the filing of the notice with the undertaking, the service of the same, and a copy of the undertaking, as the code requires; and it was not necessary to establish, by other and independent evidence, that these preliminary steps, which are required to perfect the appeal, had been taken. It may also be remarked that the complaint alleged that the judgment appealed from was by the court of appeals duly affirmed, with one hundred and thirty-two dollars and twenty-one cents costs; and upon the trial it was admitted by the defendant's counsel that the judgments referred to in the complaint were duly recovered, as therein stated. But even if the provisions of the code had not been complied with in the particulars named, it was, at most, an irregularity; and the submission of the cause to the court of appeals by the respondent, without any

objection to the jurisdiction, must be regarded as a waiver of the filing and service, and obviate the alleged defect." (See, also, *Murdock* v. *Brooks*, 38 Cal. 600; *Hathaway* v. *Davis*, 33 Cal. 161; *Pierce* v. *Whiting*, 63 Cal. 538.)

Another point of appellants must be noticed. They contend that plaintiff has not suffered any damages, caused by a stay by virtue of the undertaking, but that the damages occurred by reason of an order of the district court staying execution, which order is still in force. In regard to that order and the time when it was made, we observe the following facts, as they appear in the record: The *remittitur* from this court in *Parrott* v. *Hungelburger*, 9 Mont. 526, was filed in the district court July 22, 1890. The following November 28th a writ of restitution was issued. A year later, December 3, 1891, the writ of restitution was, on motion of defendant, recalled and quashed, and all proceedings were stayed. This action now before us on appeal was commenced March 27, 1891—prior, it is observed, to the quashing of the writ of restitution—but, when the case was tried, the stay of December 3, 1891, was still in force. As to this, the appellants urge and state in their brief, "so long as there is an order of the court in force staying execution on judgment against the party who had appealed from a lower court, the sureties on his appeal bond cannot be sued." Appellants, in this connection, cite *Parnell* v. *Hancock*, 48 Cal. 452; *Sharon* v. *Sharon*, 84 Cal. 434; *First Nat. Bank* v. *Rogers*, 13 Minn. 407; 97 Am. Dec. 239. It is said in *Parnell* v. *Hancock:* "Before the defendants, as sureties of Porter, can be sued, Parnell, their principal, must have himself become absolutely liable to pay the judgment of the county court."

But in the case at bar, the defendant, when this action was commenced, was, and still is, absolutely liable on the judgment in *Parrott* v. *Hungelburger*, 9 Mont. 526. Her liability to restore possession of the premises was adjudged by the district court, and was affirmed by the supreme court, and the *remittitur* was sent down. The judgment is final and conclusive. It is not suggested that it can ever again be questioned. The liability of defendant in that case is settled, and nothing remains but to enforce the judgment. Such were the facts

and conditions when this action was commenced. The keeping of plaintiff out of possession, and absorbing his rents and profits, and this wrongfully, were all complete facts at the commencement of this action. But pending this action, and before its trial in the district court, that court stayed the writ of restitution, but not on any grounds that affected the validity or integrity of the judgment, or the rights of plaintiff, or the liabilities of defendant thereunder. The liabilities of defendant in this case had all accrued and were completed before the action of the district court in recalling the writ of restitution. We are therefore of opinion that the damages to plaintiff were caused by the stay of execution worked by the undertaking.

The judgment is affirmed, with *remittitur* forthwith.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

KLEINSCHMIDT, RESPONDENT, v. BINZEL, APPELLANT.

[Submitted October 19, 1892. Decided January 22, 1894.]

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ESTOPPEL—*Res judicata—Judgment on demurrer.*—Where a demurrer has been interposed to a complaint upon several grounds, embracing objections to form as well as to the merits, and is sustained generally, and the pleader abides by his pleading, and suffers judgment, such judgment does not estop the same party in another action, between the same parties or their privies, where it neither appears by the record, or by extraneous evidence, that the demurrer in the former action was sustained on consideration of the merits; and, in the absence of such showing, it will be presumed to have been sustained for defects of form rather than upon each of the several grounds alleged.

Appeal from First Judicial District, Lewis and Clarke County.

EJECTMENT. Judgment on the pleadings was rendered for the plaintiff below by HUNT, J. Reversed.

Statement of the case by Mr. Justice HARWOOD:

There is but one question involved in this appeal, namely, what effect ought to be given to plaintiff's plea of former adjudication, set up in bar of defendant's cross-complaint interposed in this action?

Respondent contends that by order of the court sustaining a demurrer to a complaint in an action formerly instituted by this defendant, and no further proceedings having been taken to avoid or reverse such ruling, the rights and equities claimed by defendant in and to the property in controversy set forth in his cross-complaint in this action have been adjudicated and determined against him, and that he is thereby estopped from now asserting the same in defense of the present action. And, respondent's position having been sustained by the trial court, appellant, through this appeal, seeks to controvert the correctness of that ruling.

We will narrate, as briefly as consistent with clearness, the facts and proceedings which gave rise to this question, as shown by the record.

This is an action in the nature of ejectment, whereby plaintiff seeks to recover possession of a certain described lot of land, situate in Helena, Lewis and Clarke county, alleging in his complaint ownership thereof since April 9, 1889, and that since that date he has been entitled to possession thereof; that defendant, Binzel, on that date, wrongfully entered and took possession, and has ever since withheld possession from plaintiff, and refused to deliver the same, although demanded. The value of the rents and profits during the time of the wrongful detention is also alleged. Upon which allegations, plaintiff demands judgment for restitution of possession, and for recovery of the value of the rents and profits. Defendant made answer to this complaint, specifically denying all its allegations, and in addition to such denial, by way of further defense and cross-complaint, alleges that on June 5, 1880, and for a long time prior thereto, defendant was in the quiet and lawful possession of a certain tract of land, which is particularly described, and "which said lot embraced, and now embraces, and includes within its exterior boundaries, all the land referred to in plaintiff's complaint," and which said lot defendant held in quiet, peaceable, and lawful possession on June 5, 1880, by virtue of a contract whereby Deborah M. Hoyt and her husband, E. M. Hoyt, agreed to convey said land to this defendant, a copy of which contract is annexed

to and made a part of the answer and cross-complaint, as Exhibit A.

This contract mentioned as "Exhibit A," purports to have been executed and acknowledged by said Deborah M. and E. M. Hoyt, as the parties of the first part, and said Binzel, as party of the second part, and sets forth that the parties of the first part, for a certain consideration mentioned, to be paid at any time within two years from the first day of May, 1878, with interest, etc., covenant and agree with Binzel to convey to him, or his heirs or assigns, by good and sufficient deed, the tract of land mentioned, and defendant Binzel, on his part, covenants to well and truly pay for said land as stipulated in the contract, and it was further agreed between said parties that the party of the second part was to have possession of said premises until default of such payment for 60 days, when he was subject to ouster.

Having introduced said contract, the answer and cross-complaint proceeds to allege, that, by mutual agreement between Deborah M. and E. M. Hoyt, the owners, and this defendant, the said contract to purchase and convey "was in full force and virtue on June 5, 1880, and for a long time thereafter"; that prior to said date defendant had caused to be placed on said land, "including the land described in plaintiff's complaint," divers permanent buildings and improvements, of the value of $6,000, which were thereon June 5, 1880; that, by reason of such improvements, defendant became, and was on that date, financially embarrassed, and unable to pay the unpaid purchase price then due on said lot to said Hoyts, together with a balance due and unpaid on the cost of erecting the buildings and improvements on said lot, all aggregating $4,000; that, to procure a loan of $4,000 to make such payments, defendant entered into an agreement with William H. Weimer and Carl Kleinschmidt, "of which said agreement plaintiff had full notice on and after June 5, 1880," by the terms of which agreement Weimer and Carl Kleinschmidt were to pay off and discharge half of said $4,000 indebtedness, for an undivided half-interest in the ownership of said lot, "and they further agreed to pay, as a loan to defendant, the remainder of said $4,000 indebtedness, to wit, $2,000, and thus procure, without delay, the title to

said lot, under defendant's aforesaid contract to purchase the same from Deborah M. and E. M. Hoyt"; that on June 5, 1880, pursuant to that agreement, "defendant conveyed to said Weimer and Carl Kleinschmidt the whole of said lot K, one undivided one-half thereof absolutely, in consideration of their agreement to pay one-half of said $4,000 indebtedness, and to advance as a loan to defendant $2,000, to pay the other half of said indebtedness, and the remaining undivided half of said property was conveyed to said Weimer and Carl Kleinschmidt, to be by them held as security for said sum of $2,000 to be advanced by them as a loan to defendant, wherewith to pay and discharge the remaining half of said $4,000 indebtedness; that said Weimer and Carl Kleinschmidt did, on receipt of said deed from defendant, execute and deliver to him their agreement in writing to reconvey to defendant an undivided half-interest and ownership in and to said lot K, and to all buildings and improvements thereon, at any time within three years from said June 5, 1880, on payment by defendant of said $2,000 to be by them advanced as a loan as aforesaid," a copy of which last-mentioned agreement is annexed to his answer and cross-complaint, as a part thereof, marked "Exhibit B."

Turning to Exhibit B, it is found to disclose an instrument, in form a bond for deed, purporting to have been executed and acknowledged by William H. Weimer and Carl Kleinschmidt, whereby they firmly bind themselves in the sum of $2,000, lawful money of the United States, unto Belthaser Binzel, conditioned as follows:

"The conditions of the above obligations are such that at any time within three years from the date of this obligation; that is to say, on or before the fifth day of June, A. D. 1883, that the said B. Binzel shall pay, or cause to be paid, the sum equal to one-half the indebtedness against that certain property known as the 'Penobscot Brewery,' viz., one-half of four thousand dollars, said sum to be paid, out of the profits of said brewery, from the date of this instrument, or at any time previous to that date heretofore mentioned that the profits shall exceed the indebtedness. We bind ourselves to make and deliver to said B. Binzel a good and sufficient deed, for the consideration of

one dollar, in and to the undivided one-half interest in and to that certain property known as the 'Penobscot Brewery,' and also one frame dwelling-house, one frame ice-house, one log cooper-shop, one malt-kiln, also one-half interest in a certain bill of sale of personal property, dated this date, from B. Binzel to said first parties; all of the above-described property being situated on lot K in section 30, township 10 north, range 3 west, according to the plat of lot No. 2, as it is recorded in Book U. S., pages 88 and 89, Lewis and Clarke county, Montana Territory, Records. In case said B. Binzel fails to make such payment in the time above specified, this obligation to be null and void; otherwise, to remain in full force and virtue."

Returning to the answer and cross-complaint, it proceeds, after introducing Exhibit B, to allege that plaintiff had "due notice and knowledge" of said contract, shown in Exhibit B, "at and long prior to the time of his purchase of said lot K, or any interest therein, from William Weimer and Carl Kleinschmidt"; that Weimer and Carl Kleinschmidt wholly failed and refused to advance to, or on behalf of, defendant, or cause the same to be done, said $2,000, or any part thereof, agreed by them to be advanced to defendant, and to secure payment whereof defendant conveyed to them an undivided one-half interest in said lot K as security, as aforesaid; that pursuant to their agreement with this defendant, which was duly transferred to said Weimer and Carl Kleinschmidt, the said Deborah M. and E. M. Hoyt conveyed unto said Weimer and Carl Kleinschmidt the whole of said lot K, by sufficient deed, dated June 12, 1880, which deed was received by them under and subject to their contract with this defendant, of which plaintiff well knew, and of which he had due notice long prior to his purchase of any interest in said lot, or any part thereof; that whatever right, title, interest, or claim plaintiff has acquired in lot K is subsequent and subject to, and with due notice of, all the right, interest, claims, and equities of this defendant in and to said lot, including all the land and premises described in plaintiff's complaint; that plaintiff acquired all such interest as he may own in said premises from said Weimer and Carl Kleinschmidt, with due notice of their contract relating thereto with defendant, and with full knowledge that they had

wholly failed and refused to pay, advance, or account for the $2,000 which they agreed to advance as a loan to defendant, and to secure which they acquired and held an undivided one-half interest in said lot K, including the land described in plaintiff's complaint; that before June 5, 1883, to wit, June 4, 1883, "defendant, desiring to purchase his peace and avoid litigation, did duly tender unto plaintiff the sum of $2,000, lawful money of the United States, under and in conformity with the terms and conditions of said contract," marked "Exhibit B," and with such tender demanded of plaintiff the execution of a deed of conveyance, conveying to him an undivided one-half of said lot K, including the land described in the complaint, but plaintiff refused to accept said tender, or execute such conveyance to defendant, and has ever since continued such refusal and neglect; that, ever since such tender, defendant has been, and now is, ready and willing to pay to plaintiff the sum of $2,000, or such sum as the court may determine to be due on defendant's contract, and he now tenders the same to plaintiff, in court, and continues his demand for a conveyance of an undivided half-interest in said property according to the terms of said contract marked "Exhibit B," which plaintiff avers he has fulfilled, except in so far as prevented from so doing by the wrongful acts of plaintiff and said Weimer and Carl Kleinschmidt.

Defendant further avers that prior to all the dates and times mentioned in plaintiff's complaint, and prior to all the dates and times mentioned in his answer and cross-complaint, defendant was, and is now, in the quiet and peaceable possession of the whole of said lot K, "embracing the lands and premises described in plaintiff's complaint, as tenant in common and co-owner with said Weimer and Carl Kleinschmidt and plaintiff," which possession is jointly and as tenant in common with plaintiff. Wherefore, defendant prays judgment quieting his joint ownership of a half-interest in said premises; that an accounting be had between said defendant and said Weimer and Carl Kleinschmidt, or plaintiff, ascertaining the amount advanced by them and the amount due plaintiff pursuant to said contract, and that, on payment thereof, plaintiff

be required to convey to defendant an undivided one-half interest in and to said premises in controversy.

Plaintiff replied to this answer and cross-complaint, alleging that on June 22, 1883, defendant Binzel commenced an action by filing in this court his complaint, which complaint is fully set forth in the replication. It appears from that complaint that Binzel, as plaintiff, on June 22, 1883, commenced an action against Carl Kleinschmidt, Reinhold H. Kleinschmidt, James M. Ryan, Michael Jacobi, William H. Weimer, and Albert Kleinschmidt, as defendants, alleging in his complaint substantially all the facts set forth in the cross-complaint in the case at bar, with the same exhibits attached to said complaint of June 22, 1883, as are attached as Exhibits A and B to the cross-complaint in this case, and thereon demanded substantially the same relief on behalf of Binzel as he now seeks through his cross-complaint in the present case. The only substantial difference between the complaint of Binzel in his action of June 22, 1883, and his cross-complaint as a defense in the case at bar, is that in the former action the complaint went further, and in addition to the contracts evidenced by Exhibits A and B, and the facts alleged in relation thereto, the complaint of June 22, 1883, set forth a copartnership compact alleged to have been entered into between Binzel and said Weimer and Carl Kleinschmidt, whereby they agreed, on certain terms and conditions, to engage in and carry on the business of brewing in the Penobscot brewery, situate on the property in question, evidenced by a contract which was attached to said complaint of June 22, 1883, as Exhibit C, and that complaint alleged certain violations of the terms of said copartnership agreement, and injuries to certain partnership property, and also the destruction of said brewing business, resulting from alleged wrongful acts of said Weimer and Carl Kleinschmidt, alleged and set forth in said complaint, whereby plaintiff Binzel claimed to have been damaged in a large sum, for which he demanded judgment, along with the relief which he demanded upon the agreements evidenced by Exhibits A and B, and the facts alleged in reference thereto. There was also a further exhibit annexed to the complaint of June 22,

1883, which purports to be an assignment by Binzel to defendants Weimer and Carl Kleinschmidt of the contract between Binzel and said Hoyts for the sale and purchase of said land; and in reference to that exhibit it was alleged that, through such assignment, Weimer and Carl Kleinschmidt were enabled to obtain the conveyance of the title of said tract of land to them from said Hoyts. As to the other defendants named in said complaint of June 22, 1883, namely, Reinhold H. Kleinschmidt, James M. Ryan, Michael Jacobi, and Albert Kleinschmidt, it was alleged that they claimed some interest in said premises by way of pretended conveyances from, or as tenants of, said defendants Weimer and Carl Kleinschmidt, but that such conveyances or tenancy were acquired with full notice and knowledge of the rights of Binzel in said premises.

Having set forth that complaint which Binzel filed in his action of June 22, 1883, respecting the subject of this controversy, the plaintiff further alleges, in his reply to the cross-complaint in this action, that said complaint was demurred to by defendants therein, by filing their demurrer February 5, 1884; that such demurrer was sustained by the court, and plaintiff Binzel's bill dismissed, and judgment entered in favor of defendants in said action. That plaintiff in the case at bar "is successor to the aforesaid parties in and to the said property therein described, and is now the lawful owner thereof, and is entitled to the possession of the same, as set forth and alleged in his complaint." And upon that showing, as a reply to defendant's cross-complaint, plaintiff asserts "that by reason of the premises the said right, title, and equity of said Binzel has been adjudicated and determined, and by reason whereof he is estopped from asserting his pretended claim to said property," wherefore, plaintiff demands judgment as in his complaint. And thereupon plaintiff moved the court for judgment on the pleadings, which motion, after hearing, and examination of the record of 1883, and the alleged damage for wrongful withholding of possession having been waived, was sustained by the court, and judgment rendered for plaintiff's recovery according to the prayer of his complaint.

It appears from the record in the action of 1883 that two

demurrers to said complaint were filed. The first was overruled, as the record shows. Thereafter, another demurrer, of February 25, 1884, was interposed by defendant Carl Kleinschmidt, on the following alleged grounds:

"1. Said complaint does not state facts sufficient to constitute a cause of action. 2. Said complaint shows that the cause of action against this defendant for damages, if any existed, is, and was at the time of the commencement thereof, barred by section —, c. —, entitled, 'Limitations of the Revised Statutes of the Territory of Montana.' 3. The three causes of action set out in said complaint are not separately stated, as required by the statute. 4. There is a misjoiner of parties—Reinhold Kleinschmidt, James M. Ryan, and Michael Jacobi—as defendants herein. 5. There is a misjoiner of causes of action, in this: An action for specific performance and damages. 6. The complaint shows that the parties interested in the real property are not interested in the damage suit. 7. Said complaint shows that the parties against whom damages are claimed have no legal or equitable title to the real property in controversy. 8. No cause of action for specific performance is shown in said complaint."

This demurrer was sustained, as shown by the following record entry of March 10, 1884: "This cause having been heard upon defendant's motion to strike out, and demurrers, it is by the court ordered that the said motion to strike out, and demurrers, be sustained, to which plaintiff duly excepted. Plaintiff has leave to amend the complaint herein."

Following that record entry is another of November 12, 1884, that: "In this action, plaintiff abiding his complaint, judgment is rendered in favor of defendants." And afterwards, of December 4, 1886, another entry, that: "In this action, it is ordered that the judgment be entered *nunc pro tunc* the entry thereof made in the journals of said court November 15, 1884."

No formal judgment was found in the records of the court; but in the register of actions it is noted, of date December 4, 1886, that judgment was entered "for defendant for costs; amount, $17.20."

McConnell, Clayberg & Gunn, for Appellant.

There is but one question presented by the record for consideration: Is the plaintiff's plea of former judgment as a bar supported by the evidence? It is an elementary principle of law that a former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless such judgment was rendered upon the merits. (Freeman on Judgments, § 260. Cases hereinafter cited.) Does the evidence in this case establish the fact that the judgment, which is pleaded as a bar, was a judgment upon the merits? The record discloses that the judgment which is relied upon as a bar was rendered upon a demurrer both general and special in character. This demurrer was upon eight grounds. No evidence was introduced to show, and the record does not disclose, whether the demurrer was sustained upon one, two, or all of the grounds therein stated. Under these circumstances it will be presumed by the court that the demurrer was sustained upon the objections which did not go to the merits. (*Griffin* v. *Seymour*, 15 Iowa, 30; 83 Am. Dec. 396; *Bissell* v. *Spring Valley Township*, 124 U. S. 232.) The principle established by these decisions is also in harmony with and based upon the principle of law that where a judgment may have proceeded upon both of any two or more distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open to a new contention. (*Dygert* v. *Dygert*, 4 Ind. App. 276; *Lewis* v. *Ocean etc. Pier*, 125 N. Y. 341; *Bell* v. *Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436; *Russell* v. *Place*, 94 U. S. 606; *Packet Co.* v. *Sickles*, 5 Wall, 580; *Woodland* v. *Newhall*, 31 Fed. Rep. 435; *Sawyer* v. *Woodbury*, 7 Gray, 499; 66 Am. Dec. 518; *McDowell* v. *Langdon*, 3 Gray, 513.) The plea of a former adjudication as a bar cannot be established by inference and presumption, but must be supported by positive evidence [cases last cited]. The plaintiff having failed to show that the judgment relied upon as a bar was rendered because the complaint did not state a cause of action it will be presumed that the judgment was not a judgment upon the

merits. No proof having been offered by plaintiff to show the fact decided by the judgment which is pleaded as a bar, the whole matter is open for further litigation. Where a demurrer is sustained and the parties are left in court a judgment rendered upon such demurrer is not a judgment on the merits. (Herman on Estoppel, § 274.) Considering the whole record, then, the demurrer must have been sustained because of formal defects, and the judgment rendered cannot be pleaded as a bar. (Herman on Estoppel, § 274.) We therefore submit, that, under the principles of law stated and in the light of the facts, the judgment should not be regarded as a judgment on the merits, and the plea in bar is not well taken. But if the judgment was rendered upon the ground that the complaint did not state a cause of action it would not be a bar to the cause of action set forth in the cross-complaint, if it appears that there are different and additional allegations in the cross-complaint, and the cause of action stated in the cross-complaint is good in substance. (Freeman on Judgments, § 267; *City of Los Angeles* v. *Mellus*, 59 Cal. 452; *Gilman* v. *Rives*, 10 Pet. 301; *Gerish* v. *Pratt*, 6 Minn. 61; *Lampen* v. *Kedgewin*, 1 Mod. 207; *Moore* v. *Dunn*, 41 Ohio St. 62; *Wells* v. *Moore*, 49 Mo. 229; *Gould* v. *Evansville etc. R. R. Co.*, 91 U. S. 526; Herman on Estoppel, § 274; *City of Aurora* v. *West*, 7 Wall. 82.) The cross-complaint differs from the complaint in the former action in that there are different allegations and a different cause of action is stated as hereinafter shown. By an examination of the opinion in the case of *Gould* v. *Evansville R. R. Co.*, 91 U. S. 526, relied upon by respondent in the court below, it will be noticed that the record showed that the judgment was rendered on a general demurrer and that the allegations of the second declaration did not differ from those of the first. The case is not analogous to the case at bar in any particular. Is the cause of action stated in the cross-complaint the same cause of action stated in the complaint in the former case? (*Terry* v. *Hammonds*, 47 Cal. 32.) The first cause of action was for specific performance, and for a trespass, while the second cause of action, or the cause of action under the cross-complaint, is a cause of action to quiet title, or, in other words, to have the deed of the one-

half interest which was made and given as security for the payment of a debt declared a mortgage and canceled. (*Gassert* v. *Bogk*, 7 Mont. 585; *Kleinschmidt* v. *Kleinschmidt*, 9 Mont. 477.) In the one cause of action the defendant sets up an equitable title, and asks to have a specific performance of a contract to convey to him the legal title, while in the present action the defendant asserts the legal title to said property, and asks to have his legal title quieted.

The distinction between the two causes of action is this: In the one there was an absolute conveyance with a contract to reconvey, while in the other there was a conveyance which was in reality a mortgage. The fact that makes the conveyance in the one case a mortgage is the existing indebtedness between the parties, and it is the nonexistence of the indebtedness that makes the conveyance and the contract in the other case a contract to reconvey. (3 Pomeroy's Equity Jurisprudence, sec. 1195.) It thus appears that the two causes of action are different, and that they require different evidence to sustain them. Under these circumstances the causes of action in the cross-complaint is not *res judicata*. (Herman on Estoppel, §§ 102 and 106; Freeman on Judgments, § 252; 2 Black on Judgments, § 610; *Washington etc. Packet Co.* v. *Sickles*, 24 How. 333; *Linne* v. *Stout*, 44 Minn. 110; *Washington etc. Packet Co.* v. *Sickles*, 5 Wall. 580.) If two causes of action require different evidence to sustain them they cannot be the same. (*Norton* v. *Huxley*, 13 Gray, 285; Freeman on Judgments, § 259; Herman on Estoppel, § 96; *Stowell* v. *Chamberlain*, 60 N. Y. 272; *Clark* v. *Blair*, 14 Fed. Rep. 812; *Marsh* v. *Masterton*, 101 N. Y. 401.) It is claimed that this is not one of that class of cases where extrinsic evidence is admissible to show the judgment conclusive, which must be shown by the party seeking to avail himself of a judgment as a bar. The distinction is drawn between judgments rendered upon issues of law and judgments rendered upon issues of facts. No cases are cited in which this distinction is recognized, and we believe none can be found. On the other hand, the case of *Griffin* v. *Seymore*, and other cases cited in our former brief, clearly show that no such distinction exists. (See, also, *Foster* v. "*The Richard Busteed*," 100 Mass. 409; 1 Am. Rep. 125; *Estep* v.

Larsh, 21 Ind. 190.) It is also claimed that the judgment in the former case dismissed the complaint, and that as the case was an equity case, and the dismissal absolute, the judgment or decree is a bar to the present action. In answer to this, it is sufficient to call the attention of the court to the record, which merely shows that judgment was ordered. No judgment or decree is made a part of the record, and therefore it does not appear whether the judgment or decree, which was entered, dismissed the case absolutely or without prejudice, or at all. To support the contention of respondent, it is necessary for the court to indulge in the presumption that the judgment, which was entered, was a judgment dismissing the case absolutely. Such presumption is unwarranted. (Black on Judgments, § 115.) If, however, the former case was dismissed absolutely, under the facts as they appear of record, such dismissal would not be a bar to the present action. (*Chase's case*, 1 Bland's Ch. 206; 17 Am. Dec. 277; *Smith* v. *Auld*, 31 Kan. 262; *Foster* v. "*The Richard Busteed*," 100 Mass. 409; 1 Am. Rep. 125; *Keeler* v. *Stolzenbach*, 20 Fed. Rep. 47; *Lore* v. *Truman*, 10 Ohio St. 45.) It is also claimed that a judgment sustaining a demurrer upon grounds which go to the form rather than the substance is a bar to a future action. This is not the law to-day. (2 Black on Judgments, § 693; *Hughes* v. *United States*, 4 Wall. 232; *Terry* v. *Hammonds*, 47 Cal. 32; *Gray* v. *Dougherty*, 25 Cal. 266; *Lea* v. *Lea*, 99 Mass. 403; 96 Am. Dec. 772, and note.) It is claimed that section 243 of the first division of the Compiled Statutes of Montana conclusively determines the question that the judgment relied upon as a bar was a judgment upon the merits. Section 243 is the same as section 582 of the Code of Civil Procedure of California. Notwithstanding this provision the courts of California have universally held that a judgment which does not go to the merits of an action, even though such judgment does not come within the provisions of the section preceding, is not such a judgment as will operate as a bar to a future action. (*Gray* v. *Dougherty*, 25 Cal. 266; *Terry* v. *Hammonds*, 47 Cal. 32; *Ferrea* v. *Chabot*, 63 Cal. 554; *City of Los Angeles* v. *Mellus*, 59 Cal. 444.)

Toole & Wallace, for Respondent.

The complaint in the original case and cross-complaint, and answer thereto, in this case present exactly the same facts and comprise emphatically the same transactions and cause of action. The only difference being in the legal deduction made by the pleader, and particular relief demanded. The prayer for general relief being the same in both. When the same facts are thus pleaded, the rules of evidence being the same, the same evidence is of course admissible in both cases. Hence the same questions could have been litigated. (*Dunham* v. *Bower*, 77 N. Y. 76–79; 33 Am. Rep. 570; *Malloney* v. *Horan*, 49 N. Y. 111; 10 Am. Rep. 335; *Collins* v. *Bennett*, 46 N. Y. 490.) The formal relief demanded in the complaint or cross-complaint is not controlling in determining the nature of the action. Any relief may be had consistent with the facts pleaded. It necessarily follows that when the same facts are pleaded the same relief would be afforded. (*Hale* v. *Omaha Nat. Bank*, 49 N. Y. 626; Pomeroy's Remedies and Remedial Rights, § 580; *Bell* v. *Merrifield*, 109 N. Y. 210, 211; 4 Am. St. Rep. 436.) It being axiomatic that if the same facts are pleaded in both cases the same evidence was admissible and the same relief could have been had in either, there is but one question presented in this case worthy of consideration: Is a judgment upon a general and special demurrer, in an equity cause, conclusive as a bar as to all matters that might have been litigated upon the complaint in the action, or an amended complaint that might be properly filed therein. It is claimed that the court cannot determine from the record whether the demurrer was sustained upon the special grounds, the ones going to the merits of the action. This is not that class of cases where extrinsic evidence is admissible to show certain facts, making the judgment conclusive, which must be shown by the party seeking to avail himself of a judgment as a bar. If sustained upon either, it was the duty of the defendant to amend or correct the error, if any, upon appeal. If he fails to do this, the law fixes the effect of the judgment to be co-extensive with what might have been accomplished had that course been pursued. The former class of cases depend upon questions of fact which it became necessary to determine in the progress of

the trial, and which did not appear from the pleadings. The latter depends upon legal propositions raised by the demurrer and which might be obviated by amendment, or corrected on appeal, and upon which extrinsic evidence is inadmissible. No remedy is afforded by oral proof, for the reason that it became the duty of the defendants, if the demurrer was sustained for cause which was amendable, to amend; if on account of the error of the court in sustaining it, to appeal and correct the error, and if on formal matter, to have the judgment so state. If he does neither the presumptions are that no such reasons exist as will admit of amendment. Hence the rule must necessarily be different, the burden being upon the defendant in the first instance, his failure to act does not shift it to the plaintiff, but makes it conclusive against him. The judgment is based upon the defendant's failure to proceed further, and the grounds of demurrer cease to longer be important. If he desired to have the judgment such as would operate without prejudice to another action he should have acted accordingly, and had the ground upon which the demurrer was sustained stated. Tested by the rule invoked by appellant, if the grounds upon which the demurrer was sustained must be collected from the record, how does the case stand? Does the record show a *prima facie* case of estoppel or bar? If it does, it devolves upon defendant to rebut the presumption by showing that the judgment was rendered upon formal and not substantial causes. The demurrer was based upon three distinct grounds—Misjoinder of parties, misjoinder of causes of action, and insufficiency of the facts stated. We need not call the attention of the court to the practice so universal and so familiar to both bench and bar, that leave is given upon request to amend in either of the instances mentioned. The leave therefore given to amend, of itself, does not, in our judgment, in any manner suggest the ground upon which the demurrer was sustained, or the judgment rendered. To illustrate: If it was sustained as to a misjoinder of parties, none but those improperly joined could have taken advantage of it, and the demurrer would have been sustained as to them, and the case permitted to proceed as to the others. Hence the judgment would have been accordingly. We might, therefore, well contend, all intend-

ments being in favor of the regularity of the judgment, that it was not rendered upon that ground, but, on the contrary, that it was based upon grounds that warranted a recovery by all the defendants, which necessarily included those who were proper parties to the action; if it was, as in this case, rendered in favor of those properly joined, the presumption logically follows that it must have proceeded upon the assumption that no cause of action was stated against them. Besides, if law is a science, the presumptions would be that the judgment was not erroneous. If, to avoid a bar, it is necessary to conclude that there was error, this concession must certainly be based upon the fact that the error committed affirmatively appears. Assuming that defendant in the former action, standing as he did upon the judgment on the demurrer, had appealed, would not the court above pass upon all the grounds presented by it? It would assume that as the demurrer was sustained generally, that the lower court had passed upon it generally and not overruled it as to some of the causes stated. The same reason and inference are as applicable to the second ground of the demurrer. Being sustained generally it will be assumed that the objections were properly taken, so as to properly uphold the judgment. Had the court not sustained the demurrer generally, the presumptions are that it would have so stated. It stands like a general verdict when many issues are involved. It *prima facie* includes them all. It is claimed by appellant that the judgment could not have been rendered upon the third ground of the demurrer, because leave was given to amend. We do not think this is tenable. The practice in this state does not admit of such confusion. That leave is given to amend under such circumstances is a rule with which the court and the practitioner are familiar. To illustrate: Suppose A should sue B upon a contract which, among others, provided that after the performance of all the conditions upon A's part, and the delivery of a statement in writing with his signature thereto, B would at once execute to A a deed for certain premises. A brings a suit to compel the conveyance from B to him, but fails to allege the delivery of the instrument mentioned. B demurs to the complaint as not stating facts sufficient to constitute a cause of action, and the court sustains

the demurrer. A asks leave to amend, and leave is given. Is not this the usual practice in this state? Cannot A amend and set up the additional fact which shows a breach of the condition of the contract, places B in default, and gives rise to a cause of action? Is the fact that leave was given to amend presumptive of the grounds upon which the demurrer was sustained, in the one case any more than in the other? We respectfully submit that upon logical principles the presumptions are that the demurrer was sustained on the three grounds presented by it. In so far then as the leave to amend is concerned, it raises no presumption either the one way or the other under our practice and the rules of the courts. In the case at bar leave was given to amend, and this was his remedy. If, as claimed, the complaint may have been amendable, he refused to go further and amend, or else he was unable to so amend as to bring himself within the ruling of the court. At all events the judgment was based upon the ground that he would not or could not go further. In this the case at bar differs from all those cited by counsel for appellant. He cannot ignore the leave given to amend if he could, or consequences that result if he could not. Plaintiff could not amend without leave, he would not, or could not, amend with leave, and will not, after judgment, be permitted to maintain a second action without the judgment shows that it is without prejudice to another action, i. e., a leave to sue again. The judgment, therefore, in this case is based upon more than the ruling upon the question raised in the demurrer. It comprises a judgment upon the merits, and is to the effect that the defendant under the leave given could not, or would not, amend, the former importing that he had no cause of action, and the latter that he abandoned it, if he had. It is conclusive in either case, and is a bar to a second action based upon the same facts. In addition, therefore, to the elements involved in a judgment upon a demurrer, whether general or special, the judgment here comprises whatever follows by a failure to amend upon leave given therefor. The failure, under such circumstances, to amend must negative the presumption that he could amend, and if the law is as claimed, devolve upon him at least to prove *dehors* the record that he could. We emphati-

cally insist that in either event, whether he could amend, and would not or did not because he could not, the judgment is conclusive of the cause of action included in the former suit, and is a bar to the present. The judgment under such circumstances must conclude the contention. It cannot be reasonably presumed that the parties were still left in court, under the judgment rendered in the former suit, or that by it leave was given to again litigate the same facts tendered by it. Had the demurrer been overruled generally it would follow that none of the grounds presented by it was meritorious; having been sustained generally it will be assumed, at least until the contrary appears, that all the objections were well taken. Besides, according to the numerous decisions under the code, while the practice act controls, the principles applicable to causes in equity nevertheless prevail. Hence by analogy, the sustaining of the demurrer and the refusal of the complainant to go further in the former suit necessarily involves an abandonment by him, and is tantamount to a dismissal of the cause. We take it, therefore, that the principles of equity still adhere to the character of judgment thus rendered. That unless it would amount to a dismissal without prejudice it is a bar to a retrial of all the facts which were presented by the complaint. It is in effect a dismissal of the bill for want of merit acquiesced in by the complainant and without any reservation of his rights to further litigate the same questions which were presented. (Freeman on Judgments, § 270; *Foote* v. *Gibbs*, 1 Gray, 412; 2 Black on Judgments, p. 858, § 720; *Tankersly* v. *Pettis*, 71 Ala. 179.) If the party against whom a ruling is made on a demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleadings demurred to, he should seek to amend his pleadings, or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission the inference may justly be drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading. Courts are not established to determine what the law might be upon possible facts, but to adjust the rights of parties upon existing facts; and when their

jurisdiction is invoked parties will be presumed to represent in their pleading the actual, and not supposable, facts touching the matters in controversy. The law on this subject is well stated in Gould's Treatise of Pleading, chapter 9, part 1, section 2. (See, also, *Bouchard* v. *Dias*, 3 Denio, 238; *Coffin* v. *Knott*, 2 Greene, 582; 52 Am. Dec. 537; *Birckhead* v. *Brown*, 5 Sand. 134; *White* v. *Simonds*, 33 Vt. 178; 78 Am. Dec. 620.) It therefore follows that leave being given to amend if defendant could do so, his failure to amend, and judgment accordingly must be conclusive as to the facts stated, and also that he could not amend under the evidence at his command. This is also in accord with the doctrine announced in 2 Black on Judgments, page 849, section 710. (See, also, *Gould* v. *Evansville etc. R. R. Co.*, 91 U. S. 526.) In this case the court could not have supported the demurrer as to the misjoinder of the parties so as to render the judgment in favor of all the defendants, and not as to those which were not properly joined. (17 Am. & Eng. Ency. of Law, 608; *Horton* v. *Sledge*, 29 Ala. 478; *Bragg* v. *Patterson*, 85 Ala. 233; *Bloomingdale* v. *Durell*, 1 Idaho, 33; *Richtmyer* v. *Richtmyer*, 50 Barb. 55; *Brownson* v. *Gifford*, 8 How. Pr. 389; *Johnson* v. *Davis*, 7 Tex. 173; *Emmons* v. *Oldham*, 12 Tex. 18.) It necessarily follows, therefore, that in order to render a general judgment in favor of all the defendants the demurrer must be sustained upon such ground as will justify such a judgment. All the parties can join in that branch of the demurrer which makes an insufficient complaint grounds for a judgment on demurrer. The judgment will, therefore, be construed accordingly. (Hayne on New Trial and Appeal, §§ 284, 285.) The very object of the action being to get at the merits of the contention, and the organization of the courts, and the enactment of the laws, being in furtherance of that purpose, the presumptions are that the ruling was upon a point involving the merits unless by the terms of the judgment it is shown to be based upon formal matters. (*Bissell* v. *Spring Valley Township*, 124 U. S. 232.) So here under the demurrer the defendants admit all the facts set up in the former complaint. Leave was given to amend, and plaintiff in the case would not, or could not, do so. Judgment was rendered accordingly, which must be construed

to be coextensive with the admission and become a bar in so far as the sufficiency of those particular facts are concerned. These identical facts constitute the cause of defense here, involve the same transaction, and the sufficiency of them will not be reheard except on appeal. (*Oregonian Ry. Co.* v. *Oregon Ry. and Nav. Co.*, 27 Fed. Rep. 283.) The case of *People* v. *Stephens*, 51 How. Pr. 235 et seq., among others, presents the precise question, and emphatically determines the same in favor of the position contended for by the respondent. In that case, like this, the demurrer was based upon three grounds: The misjoinder of parties defendant, misjoinder of causes of action, and an insufficiency of the facts pleaded; the court sustained it generally, and rendered a general judgment upon such ruling; a second action was instituted, and the judgment pleaded as a bar; it was contended, as it is here contended, that the presumptions were that the judgment was based upon the grounds of misjoinder and not upon the sufficiency of the facts alleged, and the court emphatically decides that the presumptions are that the judgment was based upon the latter. In deciding the question the court says: "The judgment of a court of competent jurisdiction upon a question directly at issue between parties, unless reversed, forever concludes and estops all parties to the action and those in privity with them from questioning its accuracy or justice in another action. In support of the principles announced in the foregoing opinion, we cite: *House* v. *Mullen*, 22 Wall. 42; *Bouchaud* v. *Dias*, 3 Denio, 238; *White* v. *Simonds*, 33 Vt. 178; 78 Am. Dec. 620; *Foote* v. *Gibbs*, 1 Gray, 412; *Jennison* v. *Inhabitants, etc.*, 13 Gray, 544; *Day* v. *Vallette*, 25 Ind. 42; 87 Am. Dec. 353; *Champion* v. *Plymouth Con. Society*, 42 Barb. 441; *Burwell* v. *Knight*, 51 Barb. 267; *Yonkers etc. Ins. Co.* v. *Bishop*, 1 Daly, 449; *Sheldon* v. *Edwards*, 35 N. Y. 279. It is claimed that the plea of a former adjudication as a bar cannot be established by inferences and presumption, but must be supported by positive evidence. While this may be true with reference to questions of fact, which may easily arise where the issue is to be determined upon extrinsic testimony, it cannot have any application where the presumptions are to be gained from the record, where the judgment is pleaded as a

technical bar. In the latter case, as shown by the authorities cited by the appellant (*Griffin* v. *Seymour*, 15 Iowa, 30, 83 Am. Dec. 396, and *Bissell* v. *Spring Valley etc.*, 134 U. S. 225), the court determines the question upon the presumptions that arise from the record before it. While, in the former, evidence outside the record is introduced to show what was actually tried, it is claimed by appellant that the cause of action stated in the former suit is not identical with the cause of action set up in the answer and cross-complaint in this suit. Here, precisely the same instruments comprised the cause of action, and the only difference is the interpretation put upon them by the pleader. He now claims under the deed and conveyance, and construes it a mortgage instead of an agreement to reconvey. These are bare legal deductions, while the court could afford any relief consistent with the facts pleaded. (Pomeroy's Remedies and Remedial Rights, § 580.) If the instruments which are construed a mortgage are based upon an actual conveyance by deed of the legal title to the mortgagee, and a separate defeasance from the mortgagee to the mortgagor, it necessarily follows, that, upon a tender of the amount due upon the mortgage, it would become the duty of the mortgagee to reconvey the legal title thus conferred by the deed to him. And this was precisely what was asked in the former case, and would lead to precisely the same results in the case at bar. We may further add, in conclusion, that if the answer and cross-complaint are based upon the same facts which existed and were stated in the former complaint, that the same evidence is admissible in the latter, and the same relief may be had. (*Walker* v. *Tiffin Gold etc. Min. Co.*, 2 Col. 89; *Graham* v. *Stevens*, 34 Vt. 166; 80 Am. Dec. 675; Jones on Mortgages, § 244.) Again the provisions of our statute, section 243, that every judgment, whether upon demurrer or otherwise, is made a judgment upon the merits, except those mentioned in section 242, ought to be conclusive of this question.

HARWOOD, J.—Defendant having alleged in his cross-complaint those contracts and transactions concerning the land in controversy, shown in the above statement of the case, demanding affirmative relief, plaintiff set up in bar thereof the com-

plaint of defendant in an action which he commenced in 1883; wherein he alleged substantially the same facts, and demanded substantially the same relief, as in his cross-complaint in the present action. To which complaint in the defendant's action in 1883 demurrer was interposed and sustained, and no further action was taken therein. And the plaintiff here, who was one of the defendants in the action of 1883, avers that he has succeeded to the rights of all the other defendants in that action. Wherefore, he insists, that, by said proceedings in the former action, the right, title, and equity claimed by Binzel, defendant here, in and to the property in controversy, has "been adjudicated and determined, by reason whereof he is estopped from asserting his pretended claim to said property." In this position plaintiff was sustained by the ruling of the trial court.

Appellant has made some attempt to point out differences or distinctions between the complaint of Binzel in the action of 1883 and his cross-complaint in the present action. But a careful comparison of these pleadings we think discloses a substantial similarity in the facts alleged and relief sought; with this exception, that the complaint of 1883 went further than the cross-complaint in this action, and contained allegations in reference to an alleged copartnership compact engaged in between Binzel and certain of those defendants, and a violation thereof, and other grievances, for which he demanded a large amount of damages. As to those matters the cross-complaint in the present action is silent. But in so far as it goes in alleging the contracts and facts, on which Binzel claims rights of ownership and possession in and to the tract of land in controversy, the cross-complaint to this action is substantially the same as his complaint of 1883 on that branch of the case.

The authorities support the proposition urged by respondent that if the alleged cause of action is submitted on the merits by demurrer, admitting the facts alleged, but placing over against them in the judicial scale, the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader; and upon due weighing of the law and the facts, those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand; those facts thereby pass under the rule of *things adjudicated;*

and the party against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectually as though such facts were found from the proof or admitted *ore tenus* in the course of the trial. Such appears to be the rule deducible from the authorities, without much conflict. (*Gould* v. *Evansville etc. R. R. Co.*, 91 U. S. 526; *Bissell* v. *Spring Valley*, 124 U. S. 225; *Griffin* v. *Seymour*, 15 Iowa, 30; 85 Am. Dec. 396; *Robinson* v. *Howard*, 5 Cal. 429; *Bouchaud* v. *Dias*, 3 Denio, 238; *People* v. *Stephen*, 51 How. Pr. 235.)

But this rule should always be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus, when the pleader has submitted to the ruling of the court on demurrer, against the sufficiency of the cause of action or defense, as stated, that ruling would not bar him or those in privity with him from again asserting the same facts, accompanied by additional allegations which complete the statement of a good cause of action or defense. (*Gould* v. *Evansville etc. R. R. Co.*, 91 U. S. 526.) Nor where an action is commenced to effectuate a certain purpose—such as specific performance or to obtain injunction—and demurrer is interposed and sustained on the ground that the complaint does not show facts sufficient for such action—that is, to invoke such relief—such ruling would be no bar to an action for the proper remedy. It being pointed out in the consideration of such demurrer that, although the plaintiff, for instance, alleges an agreement for the sale and purchase of a piece of real property, and payment of part, or even all, of the purchase price, and the breach of such agreement by the vendor; still, if no other equities were shown, the court would hold that the complaint, while good for damages, is indeed insufficient to support a decree for specific performance (*Boulder Valley etc. Co.* v. *Farnham*, 12 Mont. 1), and would therefore sustain the demurrer. It may be said that this would be on the ground of want of jurisdiction. But that arises because of insufficient showing of facts to support the relief asked. The pleader would have mistaken his remedy, and, under a system where courts of law and equity were separate, the demurrer in such

cases would prevail, and the party be remitted to the proper court and action for redress. And under our united jurisprudence, where equitable and legal remedies are administered in the same court, and frequently in the same action, the demurrer in such a case, as instanced, would undoubtedly prevail, because the relief asked could not be granted on the facts stated; and although the court might have jurisdiction under our united system to grant other relief, it would probably not be forced upon the plaintiff until he had shaped his action to that end. But when he came into court with his suit for damages, it would be found that he pleaded the same transaction and breach whereby he would allege he was damaged in a certain sum, for which he would ask judgment. Likewise, if the action was commenced prematurely, as appeared on the face of the complaint, it would be held insufficient on demurrer for that cause. (*Shelden* v. *Edwards*, 35 N. Y. 286.) If it were held, in such cases, that the order sustaining the demurrer devitalized the facts first pleaded, it would prevent setting up those facts in another action, at the proper time, or in the proper form, and for available relief. So it is said by eminent authority in considering these conditions: "If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment will prove no bar to another suit." (*Hughes* v. *United States*, 4 Wall. 232.)

It is clear, however, that defendant's cross-complaint falls within the rule, and not the exception. He has in the case at bar reasserted substantially the same facts as in complaint of 1883, with no additional matter; and he asks substantially the same character of relief. Demurrer was sustained to his complaint, and that ruling stands in force. Therefore, if we had no further point for consideration, we should, without hesitation, affirm the ruling of the trial court, that the matter pleaded in the cross-complaint is *res adjudicata*, and therefore barred. But before proceeding to that conclusion, it must be inquired whether it is shown that the demurrer to Binzel's complaint of 1883 was sustained on consideration of the merits; for the authorities harmoniously concur in the propo-

sition that it must clearly appear from the record in the former case, or be proved by competent extraneous evidence, that the matter as to which the rule of *res adjudicata* is invoked as a bar was in fact adjudicated in the former action.

Upon this point it is said by Mr. Justice Nelson, in *Packet Co.* v. *Sickles*, 5 Wall. 592.

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

And again, in the case of *Russell* v. *Place*, 94 U. S. 608, Mr. Justice Field, in expressing the opinion of the court, observes:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of

the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

"Thus, in the case of the *Washington etc. Steam Packet Co.* v. *Sickles*, 24 How. 333, a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count on a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

"When the same case was before this court the second time (*Packet Co.* v. *Sickles*, 5 Wall. 580), the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: That, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, that the verdict in the suit could not have been rendered without deciding that matter, or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Announcements to the same effect could be drawn from many other cases of undoubted authority. (See *Hughes* v. *United States*, 4 Wall. 232; *Lore* v. *Truman*, 10 Ohio St. 53 *Estep* v. *Larsh*, 21 Ind. 196; *Keller* v. *Stolzenbach*, 20 Fed. Rep. 47; *Woodland* v. *Newhall*, 31 Fed. Rep. 434; *Dygert* v. *Dygert*, 4 Ind. App. 276.)

Now it appears that the demurrer in the former action specified eight objections to the complaint, but the same may be properly consolidated into three statutory grounds of demurrer,

namely: 1. Want of sufficient facts alleged to constitute a cause of action; 2. Misjoinder of causes of action; 3. Misjoinder of parties defendant. The other nominal objections are merely specifications of particulars in which the complaint is wanting or defective on some of those grounds. The record does not disclose the particular ground upon which the court sustained the demurrer. As to that ruling it is recorded that the demurrer was sustained by the court. But respondent's counsel insists that from the general order sustaining the demurrer, the presumption follows, that it was sustained on all the grounds alleged against the complaint in the demurrer. This view, although urged by an admirable argument contained in respondent's brief, and sought to be supported by citations of authority, we think cannot be maintained, because it is contrary to reason, and the rule of law upon this subject, sustained by the great weight of authority. The case of *People* v. *Stevens*, 51 How. Pr. 235, among others cited by respondent in support of the presumption which he contends for, appears to be the nearest in point. It is a New York decision, not of the last resort, but of the supreme court, general term. The demurrer under consideration in that case went to three grounds: Defect of parties; improper joinder of causes; and want of sufficient facts alleged to constitute a cause of action. The demurrer was sustained by a general order, not showing whether upon one or more of the alleged grounds of objection to the complaint. When this judgment was pleaded in bar of setting up the same facts in another action, it was insisted that the demurrer in the former action was sustained upon all the grounds of the objection stated therein. In considering that proposition the court said:

"It was according to the order and judgment, 'the demurrer,' which came on for argument at the special term, and it was 'upon the demurrer' that the judgment in favor of defendant was given. It was sustained, not in part, but as a whole, and that could only be done by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented."

With due deference, we are unable to adopt or follow that holding. It seems to us, a moment's reflection suffices to

show that the conclusion there stated contradicts the real state of the law, as well as the constant practice of the courts. It is well known that if either ground of the demurrer is sustained, that is sufficient to support the order sustaining the demurrer. How, then, could it be affirmed that the demurrer could only be sustained "by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented." That untenable conclusion is reached by arbitrarily declaring that the demurrer was sustained as a whole, when the same order could have been made on finding only one objection well founded. It would seem as proper to presume from the fact that several shots were fired by one person at another, either of which taking effect in a vital spot would produce death, and death ensued, that every shot hit the mark with fatal effect, and so hold without any further showing.

There is a presumption following a judgment that those things were adjudicated, without which the judgment could not have been rendered. This proposition is frequently asserted in the authorities, and is well founded, because it is an inherent implication that those things were considered and determined, without which the ultimate conclusion would not have been announced. This implication shows that the court, in sustaining the demurrer, held some one of the grounds fatal to the complaint, stated in the demurrer, well founded; for without such finding the ultimate conclusion that the demurrer be sustained would not have been announced by the court. But this is not sufficient to maintain respondent's position. To support that position the presumption must go farther, and cover the broad proposition that by a ruling sustaining a demurrer which attacks the complaint by several fatal objections it must be presumed that the court adjudicated and held good all the grounds which the demurrer set forth. This proves too much, and thereby weakens the proposition so that it falls of its own untenable weight. Because from that presumption it follows that where the complaint is demurred to on several grounds, such as misjoinder of causes, and also misjoinder of parties, and want of sufficient facts to constitute a cause of action, as in the case of the demurrer to Binzel's complaint of 1883, if the court adjudicated and determined every

ground unfavorable to the plaintiff, it proves that the court, while holding that the case was not in court in proper form of action, but contained a misjoinder of causes which could not be lawfully adjudicated together, and also a misjoinder of parties defendant contrary to the provisions of law, nevertheless, being aware that the case was not properly before it, the court determined to hold the case fast in its grasp, and pass upon the merits. Such is the inevitable effect of presuming, from the order merely sustaining such a demurrer, that the court passed upon and sustained all the grounds the demurrer alleged. The impropriety of such action seems plain, and we therefore think the current of presumption is the other way, as directly held by the supreme court of Iowa, in *Griffin* v. *Seymour*, 15 Iowa, 30, 83 Am. Dec. 396, where it was held that in such a case it would be presumed that the court, having found some formal defect, by reason of which the case was not properly in court, would not then proceed to consider and pass upon the merits. This is also in accord with the reasoning and conclusion of a great number of cases (some of which have been cited *supra*), that it must be clearly shown that the very matter as to which the bar of *res adjudicata* is invoked was adjudicated and determined on the merits in the former action. That it is not enough that such matter was attempted to be drawn in question if the same decision could have been rendered without its adjudication; that is, if its adjudication is not inherently implied in the judgment, it will not be held barred unless the record is supplemented by extraneous proof to the effect that such matter was adjudicated. The very rule that such evidence may be introduced in its tendency contradicts the idea that the uncertainty will be covered by presumption.

The application of the presumption contended for by respondent would, we think, frequently contradict or suppress the real fact with unjust consequences. Suppose a complaint is filed which is subject to the objection of misjoinder, or defect of parties, or improper joinder of causes of action. And, a demurrer having stated these grounds, also alleges the untenable ground of insufficient facts to constitute a cause of action. Now, the court, in considering the demurrer, would find one of the first mentioned objections well founded. But as to the

latter objection the court would either not consider it at all, because the case was not properly in court, or if the court did consider that objection, it would be found untenable. But for the other defects the demurrer would be sustained. Thereupon an order would be entered to the effect that the demurrer is sustained. The defect fully supports that order, and we venture that in a great majority of cases in our practice, where the demurrer is used with great frequency, no more specific order would be entered. In such a case, if the plaintiff and his counsel who attended the argument concluded the court was right in its ruling on the demurrer, because there was a misjoinder, or defect, of parties, or an improper union of causes, they would not appeal, for the appeal would be unavailing. Now, if the presumption for which respondent contends be established, the plaintiff in such a case would be barred from setting up those facts in another action against the same parties, or some of them, or their privies, free from the former defects, while as a matter of fact the former ruling did not touch the merits. It is said that in such a case it is the plaintiff's duty to see that the entry in the record specifies the ground on which the former ruling was made, or that it was made without prejudice to another action, and a case is cited in support of that view. (*Foote* v. *Gibbs*, 1 Gray, 412.) It may well be answered that, the time has come when it is not considered altogether amiss to claim some duties as due from the court toward litigants; and one should be to so shape the entry of court rulings in its record as not to raise unjust and untrue implications against the suitor, of which he is not the author, to burden or defeat his effort to obtain justice. Of course no such thing would be done knowingly, but it would arise in many cases where demurrers are sustained by general order, if the presumption contended for prevailed. And in the multitude of rulings which the trial judge is called upon to make he does not always expound the grounds thereof, nor, if expounded, would they be noted in the record. In the case last above cited it was held that where a cause was dismissed, and the entry of the order showed no qualification, as that it was dismissed "without prejudice," it would be presumed to have been dismissed on the merits. This ruling, however,

would hardly apply under our code. (Comp. Stats., § 242.) Moreover, in a later case (*Foster* v. "*The Richard Busteed*," 100 Mass. 412, 1 Am. Rep. 125), the supreme court of Massachusetts cites, but does not follow, *Foote* v. *Gibbs*, 1 Gray, 412, as correctly announcing the rule of procedure applicable to the conditions mentioned; and likewise did Judge Brewer in *Smith* v. *Auld*, 31 Kan. 262. (See, also, to the same effect, the case of *Steam Gauge & Lantern Co.* v. *Meyrose*, 27 Fed. Rep. 213.) It is further insisted that section 243 of Code of Civil Procedure makes it obligatory to render judgment on the merits in all other cases than those stated in the five subdivisions of the preceding section. The context, the whole chapter of which that section is a part, shows that section 243 relates to the case at a stage beyond the formation of the pleadings, where it stands for consideration and judgment on the merits, unless it is dismissed or nonsuited. The interpretation and application of that section, according to respondent's contention, would make a judgment or order on demurrer conclude the merits, even if the demurrer stated no ground which went to the merits, because such a case would be "other than those mentioned in section 242." We think it clear that the provisions of section 243 do not apply to this consideration.

It follows that the order sustaining the demurrer to Binzel's complaint of 1838 might have been based upon defects not touching the merits, and it not having been shown that such judgment proceeded upon a consideration of the merits, the ruling of the trial court holding that the facts set up in the cross-complaint were adjudicated in the proceedings of 1883 cannot be sustained. The judgment in this action is therefore reversed, and the cause remanded to be proceeded with in conformity to the views herein expressed.

Reversed.

PEMBERTON, C. J. and DE WITT, J., concur.

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BOOKWALTER, RESPONDENT, v. CONRAD ET AL., APPELLANTS.

[Submitted December 28, 1893. Decided January 22, 1894.]

APPEALS—*Motion for change of venue—How reviewed.*—An order denying a motion for a change of venue is reviewable on appeal without a bill of exceptions or a statement. If the papers on which the motion was made are properly certified to this court, as provided by section 438 of the Code of Civil Procedure, that is sufficient. (*Granite Mountain Mining Co.* v. *Weinstein*, 7 Mont. 346; *Barber* v. *Briscoe*, 8 Mont. 214; *Arnold* v. *Sinclair*, 12 Mont. 260, cited.)

Appeal from Fourth Judicial District, Missoula County.

ON MOTION to dismiss appeal. Denied.

Toole & Wallace, for the motion.

Sanford & Grubb, Bickford, Stiff & Hershey, and *A. J. Shores, contra.*

Per CURIAM.—The respondent moves to dismiss the appeal. The appeal is from an order denying defendants' motion for a change of venue. The ground of the motion to dismiss the appeal is, that it does not appear that any bill of exceptions or statement was ever signed by the judge to authorize the appeal.

But this is an appeal from an order, and may be brought up without a bill of exceptions or a statement. Section 438, Code of Civil Procedure, provides that "on appeal . . . . from an order the appellant shall furnish the court with a copy of the notice of appeal, undertaking, or undertakings on appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct."

The motion in the case at bar was made "on the demand and affidavit of merits, and on the pleadings and papers on file in said action." Therefore, if the papers on which the motion was made are certified to us by the clerk, that is sufficient. (*Granite Mt. Min. Co.* v. *Weinstein*, 7 Mont. 346; *Barber* v. *Briscoe*, 8 Mont. 214; *Arnold* v. *Sinclair*, 12 Mont. 260.)

The clerk certifies that the transcript, consisting of (enumerating all the papers), is a full, true, and correct copy of all

the papers that were asked for in the *præcipe* for a transcript. The clerk does not say in his certificate that these were the papers used on the hearing below, but he certifies that they are correct copies of the files in his court, and that they were ordered put into the transcript by the person requesting the record for the appeal. *Arnold* v. *Sinclair*, 12 Mont. 248, was a motion for a new trial. Some of the grounds for motion were upon affidavits. As to the affidavits portion of the motion, we said: "There might in some cases be difficulty in ascertaining what 'papers were used on the hearing in the court below,' if contention should arise concerning that point, but that matter could be made certain by a certificate of the judge who heard the motion and made the order, setting forth the papers used (*Walsh* v. *Hutchings*, 60 Cal. 228); but no such contention is involved here. It is stated in the notice of intention to move for a new trial, among other things, that said motion will be made on a statement of the case and affidavits setting forth newly discovered evidence; and, pursuant to that notice, two distinct classes of matter were presented in support of the motion. The notice of intention accompanies the affidavit and statement on motion for new trial, and the same are certified to be correct copies of the 'files and proceedings had and done in the cause of,' etc., giving the title of the action; and, such notice being requisite to the proceeding, and, among the files, we must presume that the same was one of the papers used on the hearing in the court below, in the absence of showing to the contrary." So, in the case at bar, there is no showing or claim to the contrary. Indeed, the respondent, moving to dismiss, says in his brief: "We do not wish to be understood as claiming that the papers in the record were not used on the trial."

The motion to dismiss the appeal must therefore be denied, and it is so ordered.

LAY, RESPONDENT, v. NIXON, APPELLANT.

[Submitted March 22, 1893. Decided January 22, 1894.]

SURETIES—*Appeal bond—Defenses.*—A surety upon an appeal bond cannot maintain in bar to an action upon the bond that his cosurety was in reality the principal, and that he had signed the bond upon the agreement of such cosurety to save him harmless, and that the plaintiff, knowing said facts, had compromised with his said cosurety for one-half of the obligation, and released him from further liability.

Appeal from Ninth Judicial District, Gallatin County.

ACTION on an appeal bond. Judgment on the pleading was rendered for the plaintiff below by ARMSTRONG, J. Affirmed.

E. P. Cadwell, for Appellant.

J. L. Staats, and *Charles S. Hartman*, for Respondent.

PEMBERTON, C. J.—This is an action on an appeal bond, executed by appellant, and one Kleinschmidt in an appeal to the supreme court in a case in which the respondent recovered judgment against the Gallatin Canal Company, the said appellant and Kleinschmidt being sureties on said bond. The complaint is such as is ordinarily used in such cases. The defendant Nixon filed his separate answer, in which he alleges substantially, among other things, that his codefendant, Kleinschmidt, although signing and executing the bond sued on as surety with appellant, Nixon, was in reality the principal; that he (Nixon) signed said bond at the request of said Kleinschmidt, and with the assurance, and under an agreement with, said Kleinschmidt, that the said Kleinschmidt would hold and save him (Nixon) free and harmless from all damages by reason of his signing and executing said bond as cosurety with said Kleinschmidt; that plaintiff well knew all these facts, and, knowing said facts, plaintiff compromised with said Kleinschmidt by receiving payment of one-half of said bond from him, and thereby released said Kleinschmidt from all further liability on said bond. The appellant pleads these facts in bar of the plaintiff's right of action, and asks that the case be dismissed as to him, and that Kleinschmidt be adjudged the principal in said bond, and that judgment be had against

him for the amount remaining due on said bond, to wit, the one-half thereof claimed to be owing from Nixon. Upon the filing of this answer in the court below the plaintiff filed his motion for judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. The court sustained this motion, and the appellant, Nixon, refusing and declining to amend his answer, judgment was rendered against him for the amount claimed. The appellant appeals from the judgment, and the order sustaining the motion for judgment on the pleadings.

The principal cause of complaint of the action of the trial court urged by appellant in his brief is, that the court refused to permit him to litigate the equities alleged in his answer to exist between him and Kleinschmidt, and to have Kleinschmidt adjudged to be the principal in the bond sued on, have the judgment in this case so state, and execution to issue first against him, as provided in section 1293, page 1005, of the Compiled Statutes.

But the answer to this contention is that the answer of appellant does not seek such adjudication and relief. The appellant's answer is a plea in bar to any right of recovery against him in this action, and he asks that he be dismissed with his costs, which would, in effect, leave respondent without remedy against him. In his answer he does not invoke the aid of said section 1293. In his answer appellant denies that plaintiff is entitled to any judgment whatever against him. In his brief his counsel admits that plaintiff is entitled to judgment against appellant. We have here one case made in the answer, and an entirely different one made in the brief and argument in this court. Upon the pleadings in this case we do not see how the court could have consistently done otherwise than it did. The answer set up no sufficient defense, and sought no relief that the court was authorized to give.

The appellant, upon the court's sustaining the motion for judgment on the pleadings, declined to amend his answer so as to have any equities that might exist between himself and Kleinschmidt adjudicated in this case, as provided for by said section 1293.

The judgment and order of the court are affirmed.

Affirmed.

HARWOOD, J., concurs.

DE WITT, J.—The district court, upon motion of plaintiff, rendered judgment on the pleadings in his favor. The defendant appeals.

In an action in which the Gallatin Canal Company was plaintiff, and Lewis E. Lay, the plaintiff herein, was defendant, said Lay obtained a judgment against the canal company for eleven hundred and eighty-three dollars and eighty cents. The canal company appealed to this court. Upon that appeal the judgment was affirmed. Appellant duly filed an appeal bond in the sum of two thousand two hundred and seventy dollars and sixty cents, staying execution on the judgment, and providing for the payment of the same if it were affirmed. The sureties on that bond were Albert Kleinschmidt and J. H. Nixon, the defendants in this action.

The said Lay (now plaintiff herein) brings this action, setting forth the above facts, and alleging that his judgment against the canal company has not been paid. He demands judgment against the defendants for the amount of the judgment in the other case, and interest and costs. The defendant Nixon filed a separate answer. He alleges that his codefendant, Kleinschmidt, was the principal owner in, and manager of, the Gallatin Canal Company, and that the appeal bond mentioned was really for said Kleinschmidt; that in the matter of the indebtedness arising upon the bond, by reason of the affirmance of the judgment, Kleinschmidt was in fact principal, and Nixon surety for Kleinschmidt; that Nixon signed said bond with Kleinschmidt upon Kleinschmidt's agreement that he would protect and hold him (Nixon) free and harmless from any loss by reason of said bond, and, if said judgment were affirmed, he (Kleinschmidt) would pay the same from the funds of said canal company; that, after the affirmance of the judgment, Kleinschmidt paid one-half thereof out of the moneys of said canal company, and received from the plaintiff herein, Lay, a full release of all claims against him (Kleinschmidt) on account of the bond; furthermore, that the plaintiff thereupon agreed to dismiss this action against Kleinschmidt, and

to release all claim against him. The answer states that this matter is alleged "by way of affirmative relief, and by way of a plea in bar." The defendant asks judgment that this action may be dismissed as against him, and that Kleinschmidt may be adjudged to be the principal on said bond and indebtedness, and this defendant only the surety, and an execution issue against defendant Kleinschmidt before it issues against this defendant, Nixon.

Upon the filing of this answer, the plaintiff moved for a judgment on the pleadings, as against Nixon, for one-half the amount demanded in the complaint. This motion was made upon the ground that the answer does not state any defense to the cause of action. This motion was by the court granted, and judgment was entered against defendant Nixon for one-half the amount demanded in the complaint. Defendant Nixon appeals.

Defendant's answer is to some extent inconsistent. He pleads certain matter as to the affairs and conduct of Kleinschmidt and plaintiff, which he asserts in his answer is a plea in bar, and he asks to be dismissed. At the same time he asserts in his answer that said same matter is pleaded for the purpose of affirmative relief, and he asks that it be adjudged that Kleinschmidt is the principal, and that he (Nixon) is the surety; and he further asks that execution be issued against Kleinschmidt before it is issued against him (Nixon). He thus seems to concede that he is liable, and wishes the priority of liability settled between himself and Kleinschmidt, under the provisions of section 1293 of the Compiled Statutes. While that section, in my opinion, is not applicable to the facts in the case at bar, yet it seems that the answer, if we read one part of the language, undertook to present the alleged facts for treatment by that section. For these reasons it has seemed to me appropriate to express the following views: By virtue of the statute of this state (Comp. Stats., div. 5, c. 76), one joint debtor, or more, may make a compromise or composition with the creditor of the joint debtors, and such compromise or composition shall be a full and effectual discharge to the debtor, or debtors, making the same, and to them only, of all liability to the creditor. Such compromise or com-

position with one joint debtor, or more, shall not discharge the other debtor or debtors, but shall be deemed to be a payment to the creditor, equal to the proportionate interest of the joint debtor or debtors so discharged; but the provisions of that chapter do not apply to any "debtor or debtors who, by the express terms of the contract upon which the indebtedness exists or arose, was the principal debtor while the other joint debtor or debtors were sureties." (Comp. Stats., div. 5, c. 76, § 1292.) The following section then provides "that upon the rendition of any judgment in any court in this state, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors, and others of the said defendant are sureties of such principal debtor or debtors, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors, or if sufficient thereof cannot be found within his county to satisfy the same, then that he levy and make the same out of the property, personal or real, of the judgment debtor who was surety." (Comp. Stats., § 1293.)

In the indebtedness to Lay on the appeal bond in question, the principal debtor was the Gallatin Canal Company, and the sureties were Kleinschmidt and Nixon. All three were debtors. Lay originally sued Kleinschmidt and Nixon, sureties. It does not appear, "by the express terms of the contract upon which the indebtedness arose" (§ 1292)—that is, it does not appear by the terms of the appeal bond—that Kleinschmidt was a principal debtor to Lay, and Nixon a surety. On the contrary, it appears by the terms of that contract that Kleinschmidt and Nixon stood in the same relation to Lay, and were joint debtors to him. Therefore, the provisions of chapter 76 apply to Kleinschmidt and Nixon, and one of them could make a separate compromise and composition, and take from Lay a discharge and release. This Kleinschmidt did. He paid one-half the debt, and was discharged in full. This released Kleinschmidt, and was a payment of the debt to the extent of one-half. This occurred after the commencement of

the action. Plaintiff herein, therefore, cannot take any judgment against Kleinschmidt. He has released and discharged him, and has agreed to dismiss the suit against him; and this for a valuable consideration. I am therefore of opinion that section 1293 does not apply to these facts. That section refers to "one or more of the defendants *against whom the judgment is to be rendered.*" Judgment is not to be rendered against Kleinschmidt in this action, as shown above. Therefore, he is not "a defendant against whom judgment is to be rendered." That being true, the method of rendering judgment provided in section 1293 cannot be here applied. Kleinschmidt is no longer in the case, under the facts set up in the answer, which now, on demurrer, are taken to be true. The action is now (since the discharge and release of Kleinschmidt) simply against Nixon alone, and in such action that defendant sets up the facts of an alleged claim of his against Kleinschmidt. Such facts must be litigated, and their legal effect determined, in an action in which Kleinschmidt is a party. He is not now a party in this action.

Appellant cites to us cases wherein it appeared that one defendant was principal and one was surety, and judgment was entered as provided in section 1293; and he contends that such relation of principal and surety between the defendant debtors may be shown on the trial, without a pleading of the facts, and notwithstanding the statute of frauds as to the requirement of a contract to answer for the default of another being in writing. We need not review those cases, or treat those propositions, because in none of those cases do the facts appear as herein, namely, that one debtor had been discharged released, and the action against him dismissed, and that the action before the court was proceeding against the undischarged debtor alone. I am of opinion that the judgment should be affirmed, with costs.

STATE, RESPONDENT, v. DONYES, APPELLANT.

[Submitted January 9, 1894. Decided January 22, 1894.]

CRIMINAL LAW—*Assault with intent to kill—Evidence.*—A conviction for an assault is amply sustained by evidence from which it appeared that one W. was attempting to do hauling over a road crossing defendant's mining claim; that the road was not public, but that defendant had given one M. a license to make or use it; that defendant had excavated a shaft some three or four feet deep across the road, rendering it impassable for teams; that W. and his men, upon arriving at the shaft with loaded teams, commenced to fill it up; that, as defendant testified, he was struck with rocks thrown into the hole by W.'s men; that W. and another man beat him, and, upon being pursued and seized, he fired his revolver, endeavoring to shoot under W.'s arm; that, as W.'s party testified, defendant tried to fire some giant powder when they began shoveling into the shaft; that W. knocked the light from defendant's hand; that defendant then pulled a revolver and threatened to kill W., and shot him when but a few feet away.

SAME—*Evidence.*—Evidence in the case at bar that the teams of the prosecuting witnesses could not turn out and go past the shaft which defendant was digging was admissible as part of the *res gestæ* to show the immediate surroundings at the time of the assault, and was not objectionable as an attempt on the part of the state to justify a trespass.

SAME—*Evidence.*—Cross-examination of one of W.'s men as to his intention to cross the mining claim against defendant's will was properly excluded, as such intention on the part of the witness would not be evidence of a similar intention on the part of W.

SAME—*Same.*—A notice of location of defendant's mining claim was admissible on behalf of the defendant in showing his intention in going upon the ground and making the excavation, but was properly excluded as testimony offered in justification of an assault by defendant with intent to murder a person coming upon the claim. (*State* v. *Smith*, 12 Mont. 378, cited.)

SAME—*Evidence.*—Objections to testimony and alleged error in permitting certain questions upon cross-examination, when no reasons for such objections are pointed out, or any showing that such questions were prejudicial to defendant, will not be reviewed on appeal. (*City of Helena* v. *Albertose*, 8 Mont. 499, cited.)

SAME—*Evidence.*—Defendant's offer in evidence of the record of an action in which the court refused to restrain him from felling trees across the road where the assault occurred was properly refused, since an undisputed ownership by defendant of the premises in question would not justify him in repelling a trespass by an attempt to murder.

SAME—*Evidence.*—Evidence that on a former occasion defendant repelled a bare trespass by another only a short distance from the place of the present assault by the use of a deadly weapon, and also threatened to kill future trespassers, together with the record of his prosecution and conviction for that offense, was admissible on behalf of the state for the purpose of showing the intent and object of defendant in being upon the premises armed as he was at the time of the assault.

Appeal from Third Judicial District, Deer Lodge County.

CONVICTION for an assault. Defendant was tried before BRANTLEY, J. Affirmed.

J. C. Robinson, for Appellant.

Henri J. Haskell, attorney general, for the state, Respondent.

DE WITT, J.—On January 20, 1891, the defendant shot one James Weller. The grand jury indicted defendant for an assault with intent to commit murder. The trial jury found a verdict for a simple assault.

A motion for new trial was made, and denied by the district court. The errors now complained of were presented to that court on that motion. Defendant appeals from the judgment.

The appellant contends that the evidence was insufficient to sustain the verdict. The facts may be epitomized as follows: Defendant was one of the locators and owners of the Broadhead Mining Claim. The claim was in a mountainous country. Weller, the deceased, had a lot of cordwood which he was moving, or endeavoring to move. This mining claim lay between Weller's depository of the wood and his proposed destination of the same. He wished to haul it over a road which passed over the mining claim of Donyes. It seems that this was not a county road or a public highway. About the most that appears is, that Donyes had sold or given to one Morgan a license to make and use this road, and that Morgan or Donyes had given Weller no leave or license to use the same. On January 20th, the day of the difficulty, the road was broken; that is, it was a path over which sleighs could be drawn. James Weller, with seven sleighs loaded with wood, with their teams and drivers, came along this road. At a narrow place they found Donyes and a hired man named O'Rourke at work in a shaft or hole in the road. The shaft was three or four feet deep, and extended across the road, so as to make it impassable for teams or sleighs. After some conversation, Weller and some of his assistants began to fill up the hole. Up to this point there is no conflict in the evidence, but here the accounts of the state and the defendant to some extent diverge.

Defendant's story is, that Weller's people began throwing rocks and clods into the hole, which struck him, the defendant; that Weller and another jumped into the shaft and commenced beating him; that he leaped out of the shaft and ran

towards his coat, in which was his pistol, and which was at a considerable distance; that the Weller party closely pursued him; that while running he picked up his coat and got it on; that he was seized by his enemies and pinioned, and while in this condition he managed to get hold of his revolver, and fired the same, endeavoring to shoot under Weller's arm.

The account of Weller's party, however, is a stronger showing against defendant. They say that their people began shoveling into the shaft; that Donyes tried to fire a fuse attached to a stick of giant powder; that Weller knocked the light out of Donyes' hand; that then Donyes jumped out of the shaft, reached into his hip pocket, and pulled a revolver, exclaiming, "You son of a bitch, I'll kill you." Weller walked toward Donyes, and, when within eight or ten feet, Donyes fired the shot from his pistol.

On this evidence, somewhat conflicting, as above noted, and on the indictment for a felony, the jury found the defendant guilty of an assault, a misdemeanor punishable by the lightest penalty known in the criminal law. The jury passed upon the facts, and there was ample evidence to sustain a verdict of a simple assault. Even if Weller and his party were guilty of a trespass against the property of Donyes, not a dwelling-house, this is not a provocation which justified Donyes in assaulting the trespasser with a deadly weapon, with the intent to kill him. (*State* v. *Smith*, 12 Mont. 378.) The objection that the verdict was not sustained by the testimony was properly overruled by the district court.

The state introduced evidence tending to show that the Weller teams could not turn out and go past the shaft which Donyes was digging, and defendant objected "that it was an attempt by the state to enforce a trespass." We do not understand just what this objection means. If it means that the evidence was an attempt by the state to justify a trespass by Weller and his party, the answer is, that there is nothing whatever to show that the testimony was offered for such purpose; that is, nothing except the defendant's accusation of such a design on the part of the state. It is apparent that the narrowness of the passage, and the obstruction of it by the hole dug by Donyes, stopped the teams coming along the road.

These facts led to the encounter between the two parties. Defendant claims that the Weller party were committing a willful and forcible trespass, and that he, defendant, therefore had the right to kill him. We do not hold that it is competent to excuse a trespass, by showing that its commission was an advantage to the person committing it, but in a contention and encounter leading to the terrible results which occurred in this case, we believe it is part of the *res gestæ* to show the close and immediate surroundings of the actors in the tragedy. That was shown by the testimony describing the condition of the road, and the shaft, and the surroundings. These remarks cover several objections made in the bill of exceptions.

Elmer Gale, a witness for the state, said: "We all knew that Donyes objected to our going over that road." The bill of exceptions states that "we" had reference to Weller and his party. On cross-examination the court refused to allow defendant to ask this question: "Then you went there for the purpose of going over, whether Donyes wanted you to or not?" This is assigned as error. If the witness went to the mining claim for the purpose of going across it, against the will of Donyes, that was not testimony of the intention of Weller in going to that place, even if such intention were a material inquiry. There was, therefore, no error in excluding this question.

The defendant offered in evidence the notice of location of the Broadhead Mining Claim, on which mining claim this difficulty occurred. The state objected to the document, on the ground that it was not a justification of the act of defendant. The objection was sustained, and error is assigned. That the ground where this difficulty happened was located as a mining claim by defendant, and, indeed, that it was owned as a mining claim by defendant, is not a justification by defendant in attempting to kill and murder a person coming upon that claim (*State* v. *Smith*, 12 Mont. 378), and, if the notice of location were offered for that purpose, it was properly excluded. The court, however, did receive it in evidence for the purpose of showing the intention of defendant in going upon the ground referred to, and in making the excavation, and his acts in connection therewith. This ruling of the court in so limiting the

testimony as to the notice of location is assigned as error. We think the court was wholly right. Defendant's ownership of the claim was proper testimony as the court admitted it, but it was not testimony of a justification of an attempt to commit murder.

There are a number of objections scattered throughout the bill of exceptions, to the effect that certain questions were not proper cross-examination. Perhaps some of them were not, but the court must exercise some discretion as to the order of admitting testimony, and there is no sort of showing that the defendant was in any way injured by the action of the court in this respect.

There are some objections to testimony found in the bill of exceptions, but defendant, in objecting, does not point out wherein the testimony criticised is objectionable. He gave no reasons to the district court, and there is therefore nothing to show but his objections were properly overruled. (*City of Helena* v. *Albertose*, 8 Mont. 499.)

The court refused defendant's offer in evidence of the record of the district court, in the case of *Durand* v. *Donyes*, in which case it appeared that the court refused to restrain the defendant from felling trees across the road where the difficulty occurred. The defendant proposed, or offered, to connect Weller and his party with Durand and the injunction case, and to show that that injunction was brought for the benefit of Weller along with Durand. In this connection defendant also offered a letter written by Donyes' attorney to him, and received by Donyes, showing that the injunction had been dissolved, and that Donyes knew of that fact. We do not think that there was any prejudicial error in excluding this testimony. The defendant was claiming ownership of the ground over which the road ran, and the record of the court offered in evidence tended to prove nothing more than that the district court on some showing—we know not what—had declined to restrain Donyes from committing certain acts upon his own premises. Even if all this were true, and even, furthermore, as noted above, if Donyes were the undisputed owner of the premises and in possession, he was not justified in repelling

a trespass upon property other than a dwelling by an attempt to murder.

The point worthy of attention in this case, we think, is the following: Over the objection of defendant the state proved, by one Dazelle, that, two or three weeks prior to the Weller-Donyes difficulty, he, Dazelle, had trouble with Donyes about passing over this same road. This occurred about two hundred yards from the place of the Weller trouble. The witness testified: "He, Donyes, came out there with a rifle. He pulled out the rifle and pointed it at me that way [illustrating how he did it]. He said to stop there. Don't go any further, because I'll hurt you. Then, after I went to his cabin, he put the rifle across a staple, and said: 'You see that rifle. Somebody will leave his gut there before he gets through with it.'" The state, in this connection, also offered the records of the district court, showing that for this offense Donyes had been prosecuted and convicted, on the charge of drawing and exhibiting a deadly weapon in a rude, angry, and threatening manner, and not in necessary self-defense. This testimony being objected to by defendant, the court admitted it for the purpose of showing the intent of defendant, and the character with which he went to the ground, and the object with which he went there.

It is held in the decisions that upon the trial of criminal charges caution should be exercised in admitting testimony of other offenses; but if the testimony offered is material to the case on trial, that testimony is not rendered inadmissible because it proves some other offense. The question is simply the materiality of the evidence to the charge being tried. The question of the admissibility of this testimony in this case can be clearly viewed by keeping before the mind the issue or contention which was the subject of the investigation before the district court. The situation was this: The state was contending that there was an assault with intent to murder. The defendant was urging in his defense that Weller and his party were trespassers, and that he, defendant, acted only in self-defense, and used only such force as he was justified in using, and was necessary to prevent the trespass. But, as frequently observed in this opinion, a bare trespass against property, not a dwelling-house, does not justify an assault with

intent to kill. Now, in this case, if defendant made an assault with intent to murder, he was guilty as charged. Evidence of his intent to commit such an offense was competent; that is, it was competent to show that he intended to repel a bare trespass, not against the dwelling, by a homicidal assault. Now, the facts as to the Dazelle matter showed Donyes' intent to prevent a trespass upon the property in question by assaulting the trespasser with a deadly weapon. The testimony as to this former trouble, in our opinion, was evidence tending to show the intent and object of defendant in being upon the premises, in the road, and armed, as he was at the time of the difficulty. On the former occasion he had repelled a bare trespass by the use of a deadly weapon, and at that time he had made declarations which tended to show his intent to kill any trespasser in the future. The former difficulty was two or three weeks prior to the latter one; it occurred over the same property, and was as to the same claims of right by the defendant. (See 3 Rice on Evidence, c. 25, and cases cited and reviewed.)

Counsel for appellant, in his brief, contends that there were errors in the instructions. But the instructions are not here in a bill of exceptions, nor are they properly authenticated for review. The judgment is affirmed, and it is ordered that it be carried into effect as adjudged by the district court.

PEMBERTON, C. J., and HARWOOD, J., concur.

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WALSH ET AL., APPELLANTS, v. MUELLER ET AL., RESPONDENTS.

[Submitted December 14, 1893. Decided January 22, 1894.]

NEW TRIALS—*Settlement of statement—Waiver of lapse of time.*—Failure to object to extensions of time beyond the statutory period for the settlement of a statement on motion for a new trial, offering amendments, and joining in the settlement thereof without objection, operates as a waiver of the lapse of time for the service of the statement.

SAME—*Service of notice and statement—Attorneys.*—A notice and statement on motion for new trial need not be served on all the attorneys of certain of the respondents, when attorneys representing all the respondents were properly served.

Appeal from Sixth Judicial District, Meagher County.

ON MOTION to dismiss appeal. Denied.

Toole & Wallace, for the motion.

H. G. McIntire, and *McConnell, Clayberg & Gunn, contra.*

Per CURIAM.—The respondents move to dismiss the appeal from the order of the district conrt denying a new trial. The first ground of the motion is that the statement on motion for new trial was not served within the time provided by statute, or within the thirty days from the period to which it might be extended. (Comp. Stats., § 536, p. 201.)

We observe, by the record, that the time was extended very much more than thirty days, and without the consent of the opposite party; and if this were all that appeared, the statement on motion for new trial could not be considered. (*Doyle* v. *Gore*, 13 Mont. 471.) But it appeared by the judge's certificate, in settling the statement, that not only no objections were made to these extensions, and the lapse of time, but that the opposing party came in with amendments, and joined in the settlement, without objections. The lapse of time was therefore waived. (*Sweeney* v. *Great Falls etc. Ry. Co.*, 11 Mont. 34; *Arnold* v. *Sinclair*, 12 Mont. 261.)

Other grounds for dismissing the appeal are urged, in that the notice of motion and statement on motion for new trial was not served on all the attorneys for certain defendants. Messrs. Waterman and Callaway were attorneys for certain defendants. Mr. T. C. Bach was attorney for certain other defendants. The objection is made of want of service upon Messrs. Waterman and Callaway, and Mr. T. C. Bach. But the papers were served on Messrs. Toole and Wallace, who, we think it sufficiently appears from the records and appearances, were attorneys for all the defendants.

The motion is denied.

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NELSON, RESPONDENT, v. DONOVAN ET AL., APPELLANTS.

[Submitted December 23, 1893. Decided January 22, 1894.]

NEW TRIALS—*Time for taking appeal.*—An appeal from an order granting motion for a new trial, not taken within sixty days from the filing of the order, as required by section 421 of the Code of Civil Procedure, will be dismissed on motion.

APPEALABLE ORDER.—An order granting a motion for judgment on the pleadings is not appealable.

Appeal from Eighth Judicial District, Cascade County.

ON MOTION to dismiss appeal. Granted.

Ed L. Bishop, for the motion.

Donovan & Lyter, contra.

Per CURIAM.—The respondent moves to dismiss the appeal from the order granting a new trial, for the reason that the appeal was not taken within sixty days after the order was filed with the clerk of the district court.

It appears by the record that the new trial was granted in April, 1893, and that the appeal was taken August 12, 1893. The appeal must be taken "within sixty days after the order . . . . is made and entered in the minutes of the court, or filed with the clerk." (Code Civ. Proc., § 421.) The appeal from the order granting a new trial was not taken within the time prescribed, and must be dismissed, and it is so ordered. After the district court had granted plaintiff a new trial, it granted plaintiff's motion for judgment on the pleadings. From this order defendants also appeal. Respondent also moves to dismiss the appeal from this order. This motion is also granted, as an order granting a motion for judgment on the pleadings is not appealable. But the judgment itself is appealable, and the notice also states that defendants appeal from the judgment.

The case is therefore left in court standing upon the appeal from the judgment.

HAGGIN, RESPONDENT, v. SAILE ET AL., APPELLANTS.

[Submitted April 3, 1893. Decided January 29, 1894.]

APPEAL—*New trial.*—An order granting a new trial will not be reversed on appeal when, upon consideration of the evidence and assignments, no abuse of discretion appears.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for injunction. Defendants had judgment below. Plaintiff's motion for a new trial was granted by DURFEE, J. Affirmed.

Forbis & Forbis, for Appellants.

M. Kirkpatrick, for Respondent.

PEMBERTON, C. J.—This case involves a dispute as to priority of right to the use of the water flowing through Glover cañon, situate in Deer Lodge county. Plaintiff sought to enjoin defendant from interfering with his alleged prior right to the use of said water.

The case was tried to the court and a jury. The jury returned special findings in favor of defendants, which findings the court adopted, and rendered judgment accordingly, to the effect that defendants are entitled to all of the water in question, prior to the claim of plaintiff. Plaintiff then moved the court, upon a statement of the case, for a new trial, which motion was by the court granted. From that order defendants prosecute this appeal.

Plaintiff claims title to said water by virtue of the appropriation thereof by one Alexander Glover, in 1872, and use thereof continuously, until 1883, when he sold and conveyed the same, together with a parcel of land, to plaintiff; and further use of said water by plaintiff. Defendants concede that said Alexander Glover had a valid appropriation of said water, and conveyed the same to plaintiff as aforesaid. But defendants contend that plaintiff had abandoned, and neglected to use, said water, and that defendants had appropriated said water, and used the same continuously for the period of more than five years, adversely to the claim of plaintiff. A review

of the record discloses the fact that defendants' claim to the prior right to the use of said water depends upon the alleged fact of abandonment thereof by plaintiff, and the adverse use and enjoyment thereof by defendants during the period of five years limitation; and further discloses that if the use made of such water after purchase by plaintiff, upon his lands, in the operation of making brick, carried on by one Campbell, under contract, was a use by or on behalf of plaintiff, then the claim of adverse possession set up by defendants fails. Appellants admit that the case as here presented, on the question whether the court was justified, or abused its discretion, in granting a new trial, depends upon a review and construction of the testimony of said Campbell, who was engaged in manufacturing brick upon the land of plaintiff, and by the use of said water thereon, under contract.

The very situation under which we must review this case, if it is to be returned for another trial, precludes a discussion as to the force of the evidence upon the vital points in the case. We therefore refrain from such discussion. We have carefully considered the evidence and assignments set forth in the record, and cannot find therefrom that the evidence upon the important points in the case is so clear as to warrant us in reversing the order of the trial court granting a new trial. In order to justify us in reversing the order of the trial court granting a new trial it must appear that there was an abuse of judicial discretion on the part of the trial court in granting such motion. This we do not find. The order appealed from will therefore be affirmed.

HARWOOD, J., concurs.

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RYAN ET AL., APPELLANTS, v. MAXEY ET AL., RESPONDENTS.

[Submitted March 24, 1893. Decided January 29, 1894.]

ATTACHMENT—*Waiver of lien—Appeal.*—An attaching creditor does not waive his attachment lien by taking judgment and selling the attached property under execution, while an appeal from an order dissolving the attachment is pending and undetermined.

SAME—*Same—Surviving partner—Statutory construction.*—The amendment of section 229 of the Probate Practice Act (Sess. Laws 1889, p. 146), requiring a surviving partner to settle the affairs of the partnership without delay, "treating all creditors alike, and giving no preference to any, except such as are made so by mortgage, pledge, or lien," enacted prior to a sale of partnership property under execution, cannot be construed to abrogate an attachment lien acquired thereon prior to its passage, as such construction would render it retroactive.

CREDITOR'S BILL—*Supplementary proceedings—Judgment lien.*—A creditor's bill to enforce a judgment lien against property claimed by defendants under a judicial sale need not be preceded by proceedings supplementary to execution, as such summary process is applicable to the discovery of property subject to execution, concealed or withheld by the debtor or others in collusion with him without pretense of substantial right, and not to cases where the attitude of the parties to the property in controversy is fully understood.

Appeal from Ninth Judicial District, Gallatin County.

CREDITOR'S BILL. Judgment was rendered for defendants below by ARMSTRONG, J. Affirmed.

E. P. Cadwell, for Appellants.

Luce & Luce, for Respondents.

HARWOOD, J.—Through this action, in the nature of creditor's bill, plaintiffs seek to establish and enforce judgment liens claimed by them upon certain property held and claimed to be owned by defendants. These conflicting claims arose in this wise: Plaintiffs are the owners of certain judgments rendered against Jacob F. Speith, as the surviving partner of the firm of Speith & Krug, aggregating in amount about twenty thousand dollars, which judgments were rendered in 1888, and are unsatisfied. Defendants are also judgment creditors of the same character; that is, they own judgments recovered against said Jacob F. Speith as surviving partner of Speith & Krug. It appears, however, that these defendants, in the commence-

ment of their actions against said surviving partner, levied attachments upon all of the property of said firm available for payment of its debts, and thereafter said property was sold on executions issued to enforce the judgments and attachment liens acquired by defendants through said actions; and by virtue of such judicial sales, these defendants claim title to the property in controversy in this action.

Plaintiffs in this action, who obtained or succeeded to judgments against said surviving partner, but who failed to get any of the proceeds of the property of said firm in satisfaction of their judgments, now, through this action, undertake to establish what they claim to be liens on said property arising from their judgments. They maintain that said attachments, torerunning those judgments of defendants in this action, were, for certain reasons to be hereafter considered, void processes.

The process of attachment levied upon said property in said actions of defendants against Speith, surviving partner, etc., were contested by motion to dissolve the same, which motion prevailed in the trial court; but that ruling was reversed on appeal to the supreme court, wherein it was held that such attachments would lie. (See *Krueger* v. *Speith*, 8 Mont. 482; *Cobb* v. *Speith*, 8 Mont. 494; *Maxey* v. *Speith*, 8 Mont. 494; *Bozeman Nat. Bank* v. *Speith*, 8 Mont. 495.) So it appears that those attachments were upheld, and in due course the title now held by these defendants was acquired by sale of the attached property on execution issued upon the judgments obtained in those attachment suits.

One of the minor points urged by appellants is, that those attachment liens were waived, or became void, because the plaintiffs in those attachment suits proceeded, after obtaining judgment, to sell the attached property under execution, while the appeals from the respective orders dissolving said attachments were pending, undetermined. No authorities are cited to support this proposition, and we fail to perceive any force in it, either from analogy to other rules of waiver, or upon principle or reason. The proposition assumes that those attaching creditors, by appealing, and superseding or holding in abeyance the order of the trial court dissolving their attachments, and then prosecuting their appeals to the effect of

reversing those orders, waived the rights and liens acquired through those attachments, because they proceeded to take judgment and execution in the same actions, as the law provides. It is not surprising that appellants have failed to cite any cases, or text of commentator, in support of this position.

After the decision upholding the attachment liens, cited *supra*, the legislature of Montana enacted an amendment to section 229 of the Probate Practice Act. (Sess. Laws 1889, p. 146.) Appellants contended that the provisions of said statute, as amended, require that all of said partnership estate be applied to the payment of the partnership creditors "alike, and giving no preference to any, except such as are made so by mortgage pledge or lien," and that, this provision having been enacted prior to the sale of the partnership property under execution in the cases above referred to, had the effect of so changing the law relating to those cases, while in progress, as to annul the attachment liens acquired and existing prior to the passage of that amendment, and that the sale of said property under execution was void as in contravention of that statute. We do not think appellants' view can be maintained. It would give the statute under consideration the retroactive effect of abrogating the liens lawfully acquired by attachment, and existing when the present statute was enacted. In our opinion, the ruling of the trial court in refusing to so construe the statute was correct. (*Gunn* v. *Barry*, 15 Wall. 610, *Eastman* v. *Clackamas Co.*, 32 Fed. Rep. 24.) In order to sustain plaintiffs' action it was necessary to give the statute such retroactive effect. We think the demurrer was properly sustained.

Respondents raise a question of practice, insisting that this action, in the nature of a creditor's bill, is improper procedure, that such action has been superseded by the statute providing for proceedings supplementary to execution, which proceedings, respondents contend, should have been invoked for the relief sought by appellants. In support of this view, several cases are cited, among which is *Sperling* v. *Calfee*, 7 Mont. 529, wherein it is remarked that those provisions of our code (Code of Civil Procedure, chapter 2, title 9), for proceedings supplementary to execution have, to a great extent, if not wholly,

superseded the equitable action known as the "creditor's bill." Similar observations have been made in many other cases, and we in no manner question their correctness; for in many respects the relief formerly achieved through the creditor's bill is now afforded with less expense, formality, and delay, and with equal potency, through the summary proceedings supplementary to execution authorized by statute. But it is hardly to be concluded, either from those observations or the provisions of the statute authorizing supplementary proceedings, that the same were intended to utterly abolish equitable proceedings to set aside fraudulent conveyances, assignments; encumbrances, and the like, to enable the judgment creditor to reach equitable assets put beyond the reach of ordinary legal process by some fraudulent device of the judgment debtor—remedies which supplemental proceedings are inadequate to accomplish—preserving to disputants the ordinary method of trial touching property rights. Indeed, the statute contemplates the development of conditions, in the course of supplemental proceedings, which cannot be adjudicated therein, and therefore the statute directs that proper suit be ordered by the court to adjudicate and determine the same. (Code Civ. Proc., § 356; *Teitig* v. *Boesman*, 12 Mont. 404.) It seems to have been the intention of the framers of that statute, to provide a summary process for the discovery and application to the judgment of property subject to execution, concealed and withheld by the debtor, or others in collusion with him, without pretending, when it came to a test under oath, to assert any substantial ground therefor. But where the property alleged to belong to the judgment debtor is claimed by others, either by way of absolute title or pledge or mortgage, or debts claimed to be owing to the judgment debtor are disputed by his alleged debtor, such claims of ownership, lien, or denial of indebtedness cannot be adjudicated and determined summarily, and the property ordered applied to the judgment, without the usual formalities of forming issues and trial, guaranteed as applicable to the determination of property rights. While it might be proper enough to turn the searchlight of supplemental proceedings onto the subject, to discover the attitude of parties towards the property or fund in question, and through

that proceeding obtain an order forbidding the disposition thereof, still many cases will arise where that proceeding alone cannot accomplish all that may be necessary to cut off adverse claims, and avail the judgment creditor of the assets in controversy. On the other hand, it may be that the attitude of the parties to the subject of controversy is fully known, as in the case at bar, where it seems proceedings supplemental to execution could neither accomplish nor aid the relief sought. And, in our opinion, in such cases, the appropriate action to test the claims or defenses which parties may assert in opposition to taking the property or fund for application on the judgment should not fail because supplemental proceedings did not precede it. This appears to be the view taken by the courts where these distinctions have been considered—especially in the New York courts, where the statute for proceedings supplemental to execution originated—as shown by Mr. Freeman in his work on Executions, section 394. (*Gere* v. *Dibble*, 17 How. Pr. 31; *Goodyear* v. *Betts*, 7 How. Pr. 187; *Davis* v. *Turner*, 4 How. Pr. 190; *Bartlett* v. *Drew*, 4 Lans. 444; *Phelps* v. *Platt*, 50 Barb. 430; *Hammond* v. *Hudson River etc. Machine Co.*, 20 Barb. 378; *Burt* v. *Hoettinger*, 28 Ind. 214; *Parsons* v. *Meyburg*, 1 Duvall, 206.)

For the foregoing reasons the judgment of the trial court will be affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

MARTIN, APPELLANT, v. MAXEY, RESPONDENT.

[Submitted November 3, 1893. Decided February 5, 1894.]

ATTACHMENT—*Waiver of lien.*—An attaching creditor does not abandon his attachment by taking judgment and selling under execution the attached premises while an appeal from an order dissolving the attachment is pending and undetermined.

APPEAL—*Matters not reviewable.*—A question of practice relating to the regularity of an appeal from an order dissolving an attachment, and which appeal was entertained and determined, will not be reviewed by this court several years later on an appeal by one attacking in a subsequent action the title of the attaching creditor.

Appeal from Ninth Judicial District, Gallatin County.

CREDITOR'S BILL. Judgment was rendered for defendant below by ARMSTRONG, J. Affirmed.

E. P. Cadwell, for Appellant.

Luce & Luce, for Respondent.

HARWOOD, J.—This action is of kindred nature, and mainly determined by *Ryan* v. *Maxey*, just decided by this court. (See *ante*, p. 81.) But a few slight distinctions should be noticed.

Appellant insists: 1. That the attachment lien acquired by attachment of the property in controversy was lost by taking out execution and selling the attached property thereon, while the appeal from the order of Judge Liddell dissolving the attachment was pending in the supreme court. (*Maxey* v. *Speith*, 8 Mont. 494.) The attaching creditor perfected his appeal from that order, and, while the same was pending and undetermined, he prosecuted the action in which the attachment was issued to judgment, and took execution on the judgment, and sold the attached premises. Appellant insists that thereby the attachment was abandoned, but acknowledges that he could find no cases to cite in support of this proposition; and we consider it illogical and untenable to contend that while a litigant appeals from an order dissolving his attachment, and prosecutes such appeal to the effect of reversing the order appealed from, because he also pursues the attached property by execution, after prosecuting his action to judgment, he thereby abandons the attachment which he is at the same time seeking to uphold and keep in force by all the means provided by law on his behalf.

2. Appellant contends that the attachment in question failed, because the appeal from the order dissolving it was not taken within five days after that order was made, as provided in section 428, Code of Civil Procedure. We know, from the treatment of that appeal, that it was taken from the order dissolving the attachment in question, and that the appellate court considered that appeal, and reversed the order dissolving said attachment. We presume therefrom that the

appeal was taken, as required by law, to keep in force the attachment. The contrary view would assume that the court on that appeal considered and determined a case not properly appealed, so as to give the appellate court jurisdiction, and its determination effect upon the proceedings in question. We cannot now review the question of practice raised by appellant, relating to the regularity of the appeal taken, entertained, and determined several years since, as reported in 8 Montana Reports, 494.

3. Appellant insists that although respondents support their claim to the property in question by several sheriff's deeds, executed in pursuance of a sale of the property in question on independent judgments in several and distinct actions, the purchase of those outstanding titles by respondents merged them in that obtained by him through the sale of the same property on execution on his judgment; and insists that by reason of such merger, if the title founded on appellant's judgment can be found wanting in any respect, such defect taints all the other independent outstanding titles acquired to said property by purchase. Appellant asserts that he has cited authorities to support this position, but we think it doubtful, as there seems to be no reason in it. The case of *Vantilburgh* v. *Black*, 2 Mont. 371, is against that proposition, although in that case equitable titles were in question, while here legal titles are in question. It is unnecessary to determine this point, however, as appellant has been unable to show grounds to avoid the attachment lien of respondents, which he acquired through his own attachment and judgment. We therefore leave the point with these observations.

An order will be entered affirming the judgment of the trial court.

Affirmed.

PEMBERTON, C. J., concurs.

McDONALD ET AL., RESPONDENTS, v. MONTANA WOOD COMPANY, APPELLANT.

[Submitted January 9, 1893. Decided February 5, 1894.]

MINES AND MINING—*Placer claim.*—It is not necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each twenty acres contained in a one hundred and sixty acre placer claim, which, under section 2330 of the Revised Statutes of the United States, may be located by one person or an association of persons.

SAME—*Forfeiture—Pleading.*—Forfeiture of a placer mining claim for failure to do annual representation will not be sustained when such forfeiture is not pleaded, and no evidence is disclosed by the record of a relocation by any one on account of such failure, or that defendant had acquired an adverse outstanding title.

TRESPASS—*Treble damages—Malice.*—Treble damages for the cutting of timber on plaintiff's land, and its conversion by defendant, are not recoverable under section 363 of the Code of Civil Procedure in an action for willful and malicious trespass, in the absence of proof of malice, wantonness, or evil design.

Appeal from Fifth Judicial District, Jefferson County.

ACTION for trespass. The cause was tried before GALBRAITH, J. Plaintiff had judgment below. Modified.

Cowan & Parker, for Appellant.

I. In the case at bar eight individuals, not united in interest, attempted to locate eight placer claims, while they had made discovery of gold upon but one of such claims, or, in other words, gold was found in but one place on the entire tract. Seven of these claims are attempted to be held without any discovery having been made upon them, or either of them, and defendant is charged with having committed a trespass upon claims so situated. No authority can be found in any of the law books which would sustain the location of eight placer claims by the discovery of placer deposits upon but one of them. A placer claim consists of not more than twenty acres (U. S. Rev. Stats., § 2331; 15 Am. & Eng. Ency. of Law, p. 524), and is subject to same rules and conditions, relative to location and holding, which pertain to lode claims. (U. S. Rev. Stats., § 2329; 15 Am. & Eng. Ency. of Law, 551, and note 5; *Sweet* v. *Webber*, 7 Col. 443; *Carney* v. *Arizona Mfg. Co.*, 65 Cal. 40.) Discovery and appropriation

are the sources of right. (15 Am. & Eng. Ency. of Law, 528, § 8.) Plaintiffs acquired no title or right of possession under such a discovery, hence their action must fail. And again, the appellant contends that no discovery was made within the general boundaries of the tract of land claimed, as the same was described in their notice of location, and as the same was marked upon the ground. Plaintiffs marked their eight claims upon the ground by the blazing of four trees, one at each of the four corners of said tract. Boundaries beyond the maximum extent of a legal location would not import notice, and would be equivalent to no boundaries at all. (15 Am. & Eng. Ency. of Law, 536, note; *Hauswirth* v. *Butcher*, 4 Mont. 299.) Placer claims, held in common, are each subject to annual representation. (*Chambers* v. *Harrington*, 111 U. S. 350.)

II. The evidence in this case discloses the facts: 1. That no member of the defendant corporation felled any of the trees or timber mentioned; 2. That such trees and timber were felled by divers men at work for themselves, and not in the employ of, nor under the direction of, defendant. The evidence will not, therefore, support the allegation of trespass; and in particular will not support the theory of a malicious trespass and treble damages. Exemplary damages cannot be recovered for a trespass not malicious in its character. (*Phelps* v. *Owens*, 11 Cal. 23; *Dorsey* v. *Manlove*, 14 Cal. 553; *Nightingale* v. *Scannell*, 18 Cal. 315; *Selden* v. *Cashman*, 20 Cal. 57; 81 Am. Dec. 93.)

Thomas Joyes, for Respondents.

I. Defendant denies the validity of plaintiffs' location, but does not attempt to show any right in itself to the land, or any right to cut timber thereon. This naked trespasser cannot be heard to dispute the right of possession of the plaintiffs. (*Weimer* v. *Lowery*, 11 Cal. 104.) The plaintiffs' location notice being properly made out, sworn to, and recorded as required by law, is *prima facie* evidence of what the law requires it to contain, where it is sufficiently set forth in the notice. (*Jantzen* v. *Arizona Copper Co.* (Ariz., Jan. 19, 1889), 20 Pac. Rep. 93; 15 Am. & Eng. Ency. of Law, 532.)

II. It is only necessary that the claim should be identified with reasonable certainty, and whether or not the boundaries can be readily traced is a question of fact for the jury. (15 Am. & Eng. Ency. of Law, 534, notes.) In this case the jury found that there was a proper marking on the ground, discovery, and recording, and there is no evidence to the contrary.

III. There can be no forfeiture until some other person has entered upon and relocated the claim; until that has been done, plaintiffs may at any time resume work and hold under their original location. The question as to performance of annual labor cannot therefore be raised in this case. (*Lakin* v. *Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 343; *Belk* v. *Meagher*, 104 U. S. 279.)

IV. A placer claim may contain more than 20 acres. One person can only locate 20 acres in one claim, but a location may contain 160 acres for an association of eight persons. (U. S. Rev. Stats., §§ 2330, 2331.) Such tracts have been uniformly treated as one claim. The law has been so construed by the interior department in granting patents to placer claims.

V. The cases cited by appellant as to the necessity of showing malice relate entirely to damages claimed for the seizure of personal property and have no bearing upon this statutory proceeding. We proceed under section 363, page 159, Compiled Laws of Montana, which contains no allusion to malice, but authorizes the recovery of treble damages where the trespass is committed "without lawful authority." However, in this case, malice was alleged and proved.

PEMBERTON, C. J.—On the twenty-third day of September, 1890, plaintiffs (being seven in number) and Thomas Joyes located the Landlock placer mining claim, a tract of ground in Jefferson county, which they estimated at the time contained 160 acres, but which afterwards, by a survey, was found to contain about 76 acres. Plaintiffs made but one discovery on the entire tract. They marked the boundaries by blazing a tree at each corner of the entire tract of ground, and designated each of said corners of the claim by writing with a pencil, on the respective blazed trees, the name of the claim, and the

corner each tree represented. They also marked a tree at the discovery shaft, and posted a notice on the claim. The notice contained the names of all the locators, and a description of the ground claimed. The tract of land so located was not in any way subdivided into 20 acre claims, and no other discoveries were made, or marking done on the ground, than as stated above. During the year 1891 plaintiffs did work and made improvements on the entire tract of land to the amount of about $150. The complaint, which was filed November 21, 1891, charged that in the month of December, 1890, and at divers times between that date and the commencement of this suit, the defendant knowingly, willfully, and maliciously entered upon said land without the consent of plaintiffs, and cut down and carried away a large amount of trees and timber growing thereon, etc., claiming actual damages in the sum of $3,000, and asking judgment for treble damages under section 363 of the Code of Civil Procedure. The answer denies the title of plaintiffs, and all the material allegations of the complaint. The case was tried by the court with a jury. The jury returned a verdict for plaintiff in the sum of $549.63, as actual damages, which they trebled, making the sum of $1,648.49, for which sum judgment was rendered. Defendant moved for new trial. This motion was overruled. The defendant appealed from the judgment, and the order refusing a new trial.

The appellant contends that the location of the mining claim in the manner as above described is a nullity, and conferred upon plaintiffs no right or title to the Landlock placer mining claim, or to the right of possession thereof. The appellant claims that, under the law, the plaintiffs should have made a discovery on each 20 acre tract contained in the land sought to be located; that each 20 acre tract therein contained should have been marked upon the surface thereof, so that the boundaries thereof could have been readily traced; that a separate location of each 20 acre tract was necessary under the law; and that work or improvements of the value of $100 should have been done on each 20 acre tract contained therein, for the year 1891. Section 2330 of the Revised Statutes of the United States, among other things, provides: "But no location of a placer claim made after the ninth day of July, 1870,

shall exceed 160 acres for any one person or association of persons." This statute, it seems to us, confers the right upon an association of not less than eight persons to locate not to exceed 160 acres in one claim. This has been the holding and ruling of the United States land department uniformly, as far as we have been able to discover; and patents have uniformly issued in such cases, when there was a showing of an expenditure of $500 in work or improvements upon any part of the 160 acre claim. (See *Good Return Min. Co.*, 4 Dec. Dep. Int., 221; also, Morrison's Mining Rights, 7th ed., 134.) In *St. Louis Smelting Co.* v. *Kemp*, 104 U. S. 636, Mr. Justice Field, delivering the opinion of the court, says: "The last position of the court below—that the owner of contiguous locations, who seeks a patent, must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed—is as untenable as the rulings already considered"; and in the same case it is said: "It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations." In this case just cited, Mr. Justice Field is speaking of the things necessary to be done by an applicant to obtain a patent to placer mining ground. In no case, nor in any ruling or decision of the United States land department, that we have been able to find, is it held to be necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each 20 acres contained in a 160 acre placer claim authorized to be located under one location by an association of persons. If the plaintiffs in this suit had made such a discovery on the ground in controversy, and had made such a location thereof, and were performing such work, and making such improvements thereon, as would entitle them to a patent therefor under the mining laws of the United States, then they had such title and right to possession as would entitle them to prosecute this action for damages for the trespass complained of.

The appellant further contends that the evidence shows that the plaintiffs had forfeited any right or title they may have had to the ground in controversy, by failing to do the required

amount of work thereon for the year 1891. The evidence in this case shows, that work of the value of about $150 was done for that year upon the entire claim. If, under the decisions of the land department, and the tendency of the adjudications of the courts, $500 in work and improvements on any part of a 160 acre claim, or any one of a number of contiguous claims, is sufficient to entitle applicants to a patent for the whole of such ground or claims, then, by parity of reason, it would seem that $100 in work or improvements expended or made upon such 160 acre claim in any one year would save it from forfeiture. Such seems to be the view taken by the land offices, and is in accordance with the customs, rules, and regulations of miners in this jurisdiction. But in this case a forfeiture was not pleaded by appellant in its answer, although the court below permitted evidence of the amount of work done on said claim for the year 1891. There is no evidence of a re-entry or relocation by any one on account of failure to to do the required work by plaintiffs on said ground; nor does the defendant connect itself with any outstanding title adverse to plaintiff, or plead any license or warrant to enter upon the ground in controversy. We do not find any thing in the record to support the plea of forfeiture.

The appellant contends that in this case, if it were liable for actual damages, the court below erred in rendering judgment for treble damages. This suit was instituted for damages for willful and malicious trespass; but respondents contend that, notwithstanding the complaint charges willful and malicious trespass, they are nevertheless entitled to treble damages, under section 363, Code of Civil Procedure. The respondents contend that it was not necessary, under said section, to allege or prove malice, wantonness, or evil design, etc.

In Endlich on the Interpretation of Statutes, section 129, the author, commenting on similar statutes, says: "Similarly, statutes giving punitive, double, or treble damages against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, are held confined to cases where some element of willfulness, wantonness, carelessness, or evil design enters into the act."

In *Cohn* v. *Neeves*, 40 Wis. 393, the court, in a case involv-

ing the construction of a statute similar to the one under consideration here, says: "The important question arising upon the various exceptions taken by defendants is: Does the statute give the treble damages when the conversion is merely a technical conversion in law, as in the case before us, or was it only intended to apply to cases where some ingredient of willfulness, wantonness, or evil design enters into the act? According to the view of the circuit judge, the statute applies to every case of the conversion of logs, timber, or lumber floating in any of the waters of this state, or lying on the banks or shores of such waters, or on any island where the same may have drifted, and gives treble damages as the measure of recovery. It seems to us that this is an unreasonable and unsound construction of the provision. True, the language used is general, and, if literally interpreted, would include any conversion. But, says an acknowledged authority on this subject, in interpreting a statute it is not always a safe rule, or a true line of construction, to decide according to the strict letter of the act, but courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. *Qui hæret in litera, hæret in cortice.* (Broom's Legal Maxims, page 536.) Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not. It is needless to observe that the law is highly penal in its character. By way of punishment it subjects the wrongdoer, in certain cases, to an extraordinary liability for the property of another appropriated to his use. In some cases the conversion may be merely a technical one in law, arising from accident, mistake, or even carelessness, without any evil design, and where the damages recoverable at common law afford an adequate compensation to the party injured." The same conclusion is arrived at, and the same construction placed upon a similar statute, in *Wallace* v. *Finch*, 24 Mich. 256.

In *Kramer* v. *Goodlander*, 98 Pa. St. 353, construing a statute almost identical with ours, the court say: "Its [the

statute's] object is the prevention of willful or careless cutting of another's timber, by at once punishing the wrongdoer, and amply compensating the owner."

In the case at bar the evidence shows that the land in controversy was located out in the wilderness, far away from human habitation. The plaintiffs had to cut a trail through the timber to get to it. The defendant, coming to the land from another direction, had to cut a trail also. The defendant found but little evidence that any of the land in the vicinity had ever been claimed by any person for any purpose, except the blazing of four or five trees, and a small discovery shaft on the ground in controversy, as the work of plaintiffs. There was nothing to indicate that anybody actually asserted ownership or dominion over any part of the country thereabout. The circumstances attending the trespass complained of here are vastly different from a case where a person cuts down a shade tree in front of another's house or lot, or enters another's close and damages trees or timber therein, when all the evidences of ownership in another are present. These are the acts and trespasses we think are intended to be denounced and punished by our statute. The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the rendering of judgment for treble damages against defendant in this case.

It is ordered that the judgment of the court below be modified, by rendering judgment in favor of plaintiffs against the defendant, for the amount of actual damages found by the jury, and in other respects the judgment is affirmed as modified.

Modified and affirmed.

HARWOOD, J., concurs.

ELLISON ET AL., APPELLANTS, v. BARKER ET AL., RESPONDENTS.

[Submitted February 21, 1893. Decided February 12, 1894.]

SALES OF PERSONALTY—*Fraudulent representations.*—A finding that goods were not obtained upon a fraudulent statement as to the vendee's financial condition, is supported by evidence that shortly prior to the sale the vendor had, after examining the vendee's financial condition, agreed to compromise an existing indebtedness at fifty cents on the dollar, and to extend future credit, which compromise was finally effected at the time of making the statement, and purchasing the goods in controversy.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for claim and delivery. The cause was tried before BUCK, J. Defendant had judgment below. Affirmed.

T. J. Walsh, for Appellants.

Two important allegations of the complaint are left wholly undenied, namely, that at the time the representations were made Barker was insolvent, and that he knew it. The investigation is, therefore, narrowed to two inquiries, Did Barker make the representations, and did plaintiffs rely on them? The evidence admits the making of the representations, so that the only real question is as to whether plaintiffs relied on them. In the consideration of this proposition it should be remembered that though this is a fact to be proven by the plaintiffs, yet on proof that material representations were made, and that they were false, a presumption arises that they were relied upon, and the burden falls on the defendant to show that they were not. (Benjamin on Sales, 556; *Fishback* v. *Miller*, 15 Nev. 428–43; Kerr on Fraud and Mistake, 75; *Holbrook* v. *Burt*, 22 Pick. 546–52; Benjamin on Sales, 677; *Redgrave* v. *Hurd*, L. R., 20 Ch. Div. 1–24.) In addition to the presumption afforded by the law, the testimony of Rodman B. Ellison is direct and positive that it was on his faith in the representations that he agreed to let Barker have the goods, that he relied on the truth of the same, and that the goods would not have been delivered if the statement containing the representations had not been executed. The question of whether plaintiffs relied upon the representations made to them is a question of

the state of their minds, and manifestly their positive assertion as to such a matter can only be affected by the most convincing circumstances. Conceding that the statement was not made until the day following the compromise, and that on the latter day they were willing to let the goods go without a statement, plaintiffs still had a perfect right to change their minds at any time before the delivery of the goods, and to refuse to let them go unless they had further assurance of defendant's ability to pay—being responsible, of course, for any damages he might suffer, if plaintiffs had contracted with him to deliver the goods. (*Nebraska City* v. *Nebraska Hydraulic etc. Co.*, 9 Neb. 339; *Clark* v. *Marsiglia*, 1 Denio, 317; 43 Am. Dec. 670.) If the representations were made at any time before the delivery of the goods, and the plaintiffs relied on them, or they were one of the inducements to the sale, then it was voidable. It was error to admit testimony by defendant as to his purpose in making the statement at the time of compromise, whether it was to obtain credit or to deceive and defraud plaintiffs. This testimony was irrelevant and prejudicial. The introduction of it violates the fundamental rule that every one is presumed, conclusively, to intend the natural and necessary consequences of his own acts, at least when they are acted upon to the damage of another. But the intent with which the false representations are made is wholly immaterial as established by the following authorities. (*Reed* v. *Pinney*, 35 Ill. App. 610; *Case* v. *Ayers*, 65 Ill. 142; *Foster* v. *Charles*, 6 Bing. 396; *Keith* v. *Goldston*, 22 Ill. App. 457; *Gough* v. *St. John*, 16 Wend. 646; *Johnson* v. *Peck*, 1 Wood & M., 334.)

Ashburn K. Barbour, for Respondents.

The answer does not deny that Barker was insolvent at the time of making the representations; it denies the making of the representations set forth in plaintiff's complaint, and denies that they were false and fraudulent. The denial that the representations were false and fraudulent embraces the denial that Barker knew that they were false at the time of making them. In order to constitute fraud in the matter of the statement, the element of knowledge on Barker's part was essential. (*Stitt* v. *Little*, 63 N. Y. 427–31; *Brackett* v. *Griswold*, 112

N. Y. 467; *Plant* v. *Condit*, 22 Ark. 459; *Pettigrew* v. *Chellis*, 41 N. H. 95; *Morse* v. *Dearborn*, 109 Mass. 594; *Taylor* v. *Frost*, 39 Miss. 328; *Bond* v. *Clark*, 35 Vt. 577; *Shippen* v. *Bowen*, 48 Fed. Rep. 659.) The gist of this action is the false and fraudulent representations made by Barker. In order to recover, the plaintiffs must show that the statement: 1. Was made to them, or with the direct intention that it should be communicated to them, and that they should act upon it; 2. It must be false in fact; 3. It must be false to the knowledge of the defendant, or be made by him recklessly, etc.; 4. It must be a material representation; and 5. The plaintiffs must have acted upon the faith of it, and suffered damages. (Benjamin on Sales, rev. ed., § 694; *Arthur* v. *Griswold*, 55 N. Y. 405; *Morris* v. *Talcott*, 96 N. Y. 100; *Macullar* v. *McKinley*, 99 N. Y. 355; *Taylor* v. *Frost*, 39 Miss. 328; *Bond* v. *Clark*, 35 Vt. 577; *Morse* v. *Dearborn*, 109 Mass. 593; *Shippen* v. *Bowen*, 48 Fed. Rep. 659; *Stitt* v. *Little*, 63 N. Y. 427–31.) A representation false in fact gives no right of action if innocently made by a party who believes the truth of what he asserts. (Benjamin on Sales, §§ 679–89, inclusive.) This is a settled rule in England, and is concurred in both by the queen's bench and the exchequer. (*Evans* v. *Collins*, 5 Q. B. 820; *Ormrod* v. *Huth*, 14 Mees. & W. 650; *Dickson* v. *Reuters' Tel. Co.*, 3 Com. Pl. Div. 1.) False representations to avoid a contract must be made for the purpose of inducing the party complaining to enter into the contract, and must have been relied upon by him. (*Berringer* v. *Cobb*, 58 Mich. 557; *Humphrey* v. *Merriam*, 32 Minn. 197.) In an action to recover possession of goods sold and delivered to defendants, on the ground that the sale was induced by false and fraudulent representations made by them, the burden is upon the plaintiffs to establish that such representations were made with the intent to deceive and defraud. (*Coffin* v. *Hollister*, 124 N. Y. 644; *Rothschild* v. *Porter*, 19 N. Y. Supp. 177; *Morse* v. *Dearborn*, 109 Mass. 593.) In actions for false representations and deceit, it must be shown that the defendant knew the representations to be false at the time of making them. In other words, the *scienter*, as it is termed, must be

proved. (*Plant* v. *Condit*, 22 Ark. 459; *Pettigrew* v. *Chellis*, 41 N. H. 95.)

PEMBERTON, C. J.—This is an action for the recovery of the possession of personal property, and for damages for the alleged wrongful detention thereof.

The complaint alleges "that on the third day of January, 1891, at the city of Philadelphia, state of Pennsylvania, the defendant James W. Barker, for the purpose of inducing plaintiffs to sell him certain goods, represented to the plaintiffs that he was worth the sum of $7,800 over and above all debts and liabilities, and that he was indebted for borrowed money in the sum of $1,300 only, and that his total liabilities amounted to but $3,400, including $2,100 due for merchandise; that the plaintiffs were thereby induced and did sell and deliver to the defendant James W. Barker goods, wares, and merchandise of the value of $1,000; that said representations were false, and the said defendant James W. Barker was not worth at said time $7,800 over and above all his debts and liabilities, or any other sum whatever, but at said time was insolvent, and had not sufficient property with which to pay his debts, and these facts were then known by the said defendant to be so; that at the times said representations were made the said James W. Barker was indebted to the First National Bank of Helena, as plaintiffs are informed by the officers of said bank, in the sum of $3,134.43 and accrued interest, borrowed money; that he was then indebted to one E. H. Reynolds, as plaintiffs are informed by said Reynolds, in the sum of $500, or more, for borrrowed money, and that he was then indebted to the Thomas Cruse Savings Bank in the sum of $180, for borrowed money, all of which indebtedness the said James Barker then well knew"; that defendant Barker afterwards transferred a certain part of said goods, of the alleged value of $565 (which are described in the complaint) to defendant Davidson; that plaintiffs have demanded of said Davidson the possession of said goods; that he refused to deliver the same, and now unlawfully and wrongfully withholds and detains the same. Plaintiffs ask judgment for the possession of the goods, or their value, and $500 damages for

the detention thereof. Defendant Barker does not answer, the cause having been dismissed as to him. Defendant Davidson's answer denies all the material allegations of the complaint, and alleges affirmatively as follows:

"1. Upon information and belief, defendant alleges that the goods, wares, and merchandise sold and delivered by plaintiffs to defendant James W. Barker, as set forth in plaintiffs' complaint herein, were sold to said Barker in pursuance and in accordance with a certain agreement of settlement made and entered into by and between said plaintiffs and said James W. Barker on the second day of January, 1891.

"2. That, upon the second day of January, 1891, the said James W. Barker was indebted to plaintiffs in the sum of $4,575.99; that according to the terms of said agreement the said defendant James W. Barker was to pay the said plaintiffs, in cash, the sum of $2,728, and the remaining sum of $1,847.99 in five promissory notes, four of which said promissory notes were to be made for the sum of $350 each, and the fourth of said promissory notes was to be for the sum of $447.99; and that the plaintiffs thereupon agreed to sell, and did sell, to said Barker, upon said agreement, goods, wares, and merchandise of the value of $1,016.81, the said goods including the goods, wares, and merchandise mentioned in plaintiffs' complaint herein.

"3. That the said Barker, in pursuance of the terms of said agreement, did, on or about the —— day of February, A. D. 1891, pay to the said plaintiffs the sum of $2,728 in cash, and on the second day of January, 1891, did make, execute, and deliver to the said plaintiffs the four promissory notes as hereinabove mentioned and described; and that in pursuance of said agreement the said plaintiffs did ship and deliver said goods, wares, and merchandise to the said James W. Barker.

"4. And defendant alleges, upon information and belief, that said goods and merchandise were sold and delivered in pursuance of said agreement, and in consideration thereof, and not upon any representations or statements made by the said James W. Barker upon the third day of January, 1891, or at any other time or place, or upon any other statement."

The affirmative matter of this answer is denied by repli-

cation. The case was tried by the court with a jury, and resulted in a verdict and judgment for the defendant. Plaintiffs moved for a new trial, which was denied. From the judgment and order denying a new trial this appeal is prosecuted.

It will be observed that the pleadings raise two issues: 1. Did Barker, by making said alleged false statement, induce the plaintiffs to sell him the goods involved in this controversy? 2. Were said goods sold by plaintiffs to said Barker under and in accordance with the agreement of compromise set up in the answer?

The appellant's principal contention in this court is, that the verdict of the jury in the court below is not supported by the evidence. The statement made by Barker as to his financial condition, and alleged to be false, is in writing, dated January 3, 1891, and signed by himself, and is in evidence in the case, and is substantially as alleged in the complaint. R. B. Ellison, one of the plaintiffs, testifies that he sold the goods to Barker on the faith of said statement, believing it to be a correct statement of his financial condition, and that he would not have so sold the goods to him without said statement having been given. His evidence supports the material allegations of the complaint. Samuel W. Lambeth, who swears that he has been for thirty years an assistant in the collection and credit department of the plaintiffs' firm, testifies that he was present when Barker made and signed the said statement, and his evidence is substantially to the same effect as R. B. Ellison's. These are the only witnesses on the part of plaintiffs to the facts attending the sale of the goods. Barker testifies that the goods in controversy were ordered by him in October or November, 1890, of John W. Moore, a salesman of the plaintiffs' firm; that at that time he ordered of said Moore $2,000 worth of goods; that he did not purchase them in fact in January, 1891, the date of said financial statement; that at the last date he changed the order he had given Moore in October or November, 1890, by cutting it down to the amount of $1,000, the amount mentioned in the complaint; that he did not purchase the goods in controversy under and by virtue of the financial statement made by him; that when he made said statement he was in Philadelphia, without his

books, or any *data* from which he could make a correct statement; that he told the plaintiffs he could not make a correct statement; that they insisted that he make it as best he could; that no trouble would ever come of it; that it was the custom of the firm; that prior to his making the statement he had made a contract or agreement with plaintiffs, by which he had compromised his indebtedness then existing to them at fifty cents on the dollar, and for future credit; that the purchase of the goods in controversy was completed as a result of said compromise; that this compromise agreement was made on the second day of January, 1891; that in pursuance and in accordance with the terms thereof he paid plaintiffs $2,728 cash, executed and delivered to them his four promissory notes, and delivered to them $25,000 in shares of mining stock as security for said notes, and for future credit for goods; that said goods were sold and delivered under and in pursuance of said compromise, and not on account of said financial statement; that said plaintiffs well knew his financial condition on the second day of January, 1891, the date of said statement, and prior thereto; that in December, 1890, Lambeth, witness for plaintiffs, the credit man of the plaintiff firm, came to Helena to examine, and did examine, his financial condition; that Lambeth took an inventory or account of his stock in Helena; that the compromise above mentioned was entered into verbally with said Lambeth for said plaintiffs at that time; that, in accordance therewith, he went to Canada to raise the necessary money to carry out said compromise on his part; that Lambeth was with him in Canada; that from Canada they went to Philadelphia, where said compromise agreement was reduced to writing, and signed by plaintiffs and Barker; that said contract is in evidence in this case; that the sale and delivery of the goods in controversy was the result of said compromise, and was not induced, and did not in any way result from, said financial statement mentioned in the complaint; that plaintiffs have never returned, or offered to return, the money paid, and the notes and mining stock, or any part thereof, delivered by Barker in pursuance of said compromise. The evidence in relation to this compromise is not disputed. That Lambeth was in Helena in December,

1890, and examined the financial condition of Barker for plaintiffs, is not questioned.

It being undisputed that plaintiffs, after a full examination of Barker's condition, and with full knowledge thereof, in writing, compromised their claim against Barker at fifty cents on the dollar, and agreed to extend future credit on the second day of January, 1891, how can they now consistently say that they relied on his statement of his financial condition made at the same time, as they say, and were induced thereby to part with the goods in controversy? Lambeth, the credit man of the firm, knew Barker was insolvent. The very contract of compromise signed by the plaintiffs is a showing that Barker was insolvent at the date thereof. Do these circumstances and proofs not tend to show that plaintiffs did not rely upon the financial statement made by Barker as a controlling inducement to part with their goods? Do these facts and circumstances, taken in connection with Barker's evidence, not tend to show that the plaintiffs delivered and parted with their goods under and in accordance with the terms of the written agreement of compromise, and for future credit in evidence in this case? From these facts and circumstances, were not the jury authorized to believe and find that the goods were not obtained by fraud, as alleged in the complaint, but that they were delivered under the terms of the compromise between plaintiffs and Barker? We think so. We are therefore of the opinion that the contention of appellants that the verdict of the jury is not supported by the evidence is untenable.

The appellants assign other errors as to the instructions of the court and the admission of certain evidence. We have examined the instructions, and think they clearly and fairly declared the law governing the case. We think there was no error in admitting the evidence complained of. We are of opinion that the holding in regard to the sufficiency of the evidence to support the verdict is decisive of this appeal.

The order and judgment appealed from are affirmed.

Affirmed.

HARWOOD, J., concurs.

LEGGAT, RESPONDENT, v. LEGGAT ET AL., APPELLANTS.

[Submitted February 7, 1893. Decided February 12, 1894.]

FRAUDULENT CONVEYANCES—*Attorney in fact—Collusion.*—A conveyance will be set aside as fraudulent, where it appeared that the plaintiff had, at the instance of one brother-in-law, appointed another brother-in-law her attorney in fact, and that the latter had then conveyed her interest to the former for a grossly inadequate consideration, which was accepted by plaintiff in ignorance of the facts, she having reposed entire confidence in them, and having no other source of information, and they, acting in collusion, had concealed from her the value of the property, and falsely represented the title to be in litigation, and the property to become a source of expense, while in fact it was yielding considerable revenue, and its title virtually unassailable.

SAME—*Defense—Evidence.*—A claim of equitable ownership of such property by the defendant, he alleging to have originally conveyed it to plaintiff's husband as security for a loan, is contradicted by evidence that the property was purchased by him from defendant for several thousand dollars; that thereafter he had for several years paid his proportion of the expense of annual representation, which expense also included items for personal services by defendant, and that defendant, in his letters to plaintiff, referred to plaintiff's interest as "your interest" in the property, and at the time it was conveyed to plaintiff by her husband through defendant he asserted no claim to it.

SAME—*Ratification—Evidence.*—Evidence that defendant immediately after purchasing the property had written to plaintiff, informing her of the sale, and referring to lawsuits affecting the property, saying, "The third interest I bought from you I deeded to Alex for a loan of two hundred dollars, which I sorely needed," and thereafter had sent her a portion of the money, which she received and retained for several months without repudiating the sale, although in possession of letters from defendant, tending to show that he was not the equitable owner of her property, is insufficient to show a ratification of such sale by plaintiff with full knowledge of the facts.

Appeal from Second Judicial District, Silver Bow County.

ACTION to annul fraudulent conveyance. Judgment was rendered for plaintiff below by MCHATTON, J. Affirmed.

Forbis & Forbis, for Appellants.

I. It is a well-settled rule of law, that one who alleges actual fraud against another must prove the fraud as alleged, and that relief will not be granted upon the proof of constructive fraud, or upon proof of any other fraud than that alleged in the complaint. (Kerr on Fraud and Mistake, 382, 383, and note; 1 Daniell's Chancery Practice, 327, 328, 383, and note; *Eyre* v. *Potter*, 15 How. 42; Bigelow on Fraud, 465; *Mercier* v. *Lewis*, 39 Cal. 532; *Leighton* v. *Grant*, 20 Minn.

345; *Collins* v. *Jackson*, 54 Mich. 186, 190; *Barnes* v. *Quigley*, 59 N. Y. 265; *Burnham* v. *Noyes*, 125 Mass. 85.) John A. Leggat made no false representations to the plaintiff. He did not induce her to appoint R. D. Leggat as her attorney, but in fact recommended other parties. There is no proof of any collusive conduct between John A. Leggat and R. D. Leggat. The complaint does not allege sufficient to show a fiduciary relation existing between plaintiff and defendant John D. Leggat, nor does the proof show it. In matters of this kind the brother-in-law, we think, does not stand in a fiduciary relation to the sister-in-law, and that merely doing friendly offices, as was the case on the part of John A. Leggat toward the plaintiff, does not constitute a fiduciary relation, and if there was no fiduciary relation then there is nothing in the fact that title to property has been misrepresented, even if a misrepresentation as to the title could be shown. (*Robins* v. *Hope*, 57 Cal. 493.)

II. It is also a well-settled rule of law, that where a party has been defrauded as the plaintiff claims she was in this case she must use diligence in disclaiming the transaction when it is discovered, and that she must do nothing to ratify or confirm it after the facts are brought to her notice. Plaintiff did not contradict the statements of John A. Leggat as to the condition of affairs between himself and plaintiff's husband, nor did she disclaim the action of her attorney in making the sale, but over two months afterwards received, without protest, the sum sent to her as the purchase price, and used it; and not until fourteen months after she had received the money did she disclaim the sale which had been made, although all of the evidence upon which she seeks to avoid a sale was, during the whole of this time, in her possession. The authorities upon this question are too numerous for citation, because we believe it is a universal rule of law, decided by almost every court, that the transaction must be repudiated with diligence if it was procured by fraud, and that any waiver or ratification of the fraud would preclude the party defrauded from seeking the remedy thereafter. (*Upton* v. *Trebilcock*, 91 U. S. 45; Bigelow on Fraud, 443; Kerr on Fraud and Mistake, 298 et seq.; *Sweetman* v. *Prince*, 26 N. Y. 224; *Saratoga etc. R. R. Co.* v. *Row*, 24 Wend. 74; 35 Am. Dec. 598; *Sanger* v. *Wood*,

3 Johns. Ch. 416; *Vernol* v. *Vernol*, 63 N. Y. 45; *Slaughter* v. *Gerson*, 13 Wall. 379; *Sample* v. *Barnes*, 14 How. 70.)

William Scallon, for Respondent.

I. John A. Leggat stood in confidential relations to the plaintiff; his letters to the plaintiff, as well as his evidence, show that he acted about her property as her agent and manager, both before and after this transaction. He alludes to the application for patent and entry of the claim. He collected rents for her, sold some personal property, gave leases on claims, etc. His management does not merit any commendation, but he did assume to manage plaintiff's properties in Montana; he assumed to act as her adviser and her confidential friend. He promised repeatedly that he would assist and advise any attorney whom she might appoint, and suggested the name of R. D. Leggat. Besides, R. D. Leggat's action in deeding this property to John A. Leggat was a clear violation of his duty—a fraud on the plaintiff. John A. Leggat knew it, and took and reaped the benefit of it. This makes him equally guilty with R. D. Leggat, even if there were no other act of fraud on his part.

II. There was absolute fraud as shown by the concealment; the relations of the defendants; their relations to plaintiff; the alleged conversation between the defendants, and the manner in which the deed was given; the inadequacy of consideration; falsity of defenses; failure to consult plaintiff, or fairly state the case to her; and other circumstances, even irrespective of collusion—but there is collusion. Where suspicious circumstances exist, inadequacy of consideration is almost conclusive evidence of fraud. (*Cofer* v. *Moore*, 87 Ala. 705; *Weitzell* v. *Fry*, 4 Dall. 218; 2 Pomeroy's Equity Jurisprudence, § 927, note 2; Kerr on Fraud, 189; *Allore* v. *Jewell*, 94 U. S. 506; *Hallett* v. *Collins*, 10 How. 182; *Gruber* v. *Baker*, 20 Nev. 453.)

III. "Collusion between two persons to the prejudice of a third is, to the eye of the court, the same as a fraud." (Kerr on Fraud, 195, 270; *East India Co.* v. *Henchman*, 1 Ves. Jr. 288; note to *Potter's Appeal*, 7 Am. St. Rep. 279 et seq.) Nor does it make any difference that the agent or person in

confidential relations is a voluntary agent, or that no benefit is derived by him directly from the transaction. (Kerr on Fraud, 270; *Hunsaker* v. *Sturgis*, 29 Cal. 142.)

IV. When any third person, even though a stranger, colludes with one in fiduciary or confidential relations to the plaintiff the case becomes one of constructive fraud; and the same burden is cast upon the third person as would be on an agent, and the case is governed by the rules applicable to constructive fraud. (Bigelow on Fraud, 2d ed., 1888, p. 576 et seq.; Mecham on Agency, § 797.) An agent who fraudulently and wrongfully transfers his principal's property to a third person who has knowledge or notice of the fraud, or to one who is not a *bona fide* purchaser for value, does not deprive the principal of his title to the property, nor bar his right of action to recover the property or its value from the person so receiving it. (1 Wait's Actions and Defenses, 285; 1 Perry on Trusts, 4th ed., § 211.)

V. The burden is upon the defendant to show that he dealt fairly with the plaintiff; that the latter was made fully acquainted with the value, and all of the circumstances and conditions of the property; that the price was fair, and that the defendant was guilty of no inequitable practices, or of concealment or misrepresentation; and that full disclosure was made to the plaintiff. (1 Story's Equity Jurisprudence, 318; Bigelow on Fraud, 261–63, 296–99.) That John A. Leggat sustained confidential relations to the plaintiff is shown by the following authorities, applied to the facts of this case: Bigelow on Fraud, 262; Kerr on Fraud, 183, 193; 2 Warvelle on Vendors, 866, note 5; Bishop on Contracts, § 740, note 6; wherein he quotes Seevers, C. J., in *Leighton* v. *Orr*, 44 Iowa, 679, to the effect that "it matters not what the relation is, if confidence is reposed and influence obtained." (2 Pomeroy's Equity Jurisprudence, §§ 951, 963; *Postor* v. *Balch*, 69 Mo. 123; *Bayliss* v. *Williams*, 6 Cold. 440; 1 Perry on Trusts, §§ 201, 204; *Huguenin* v. *Baseley*, 2 White & Tudor's Leading Cases in Equity, part 2, pp. 1233, 1234; *Hunsaker* v. *Sturgis*, 29 Cal. 142; note to *Potter's Appeal*, 7 Am. St. Rep. 279 et seq.)

VI. Upon the facts of this case no laches or acquiescence can be imputed to the plaintiff. Before laches can be imputed

the injured party must have acquired knowledge of the fraud, and have delayed an unreasonable time after the discovery; and he must have been fully apprised of all the facts relating to the fraud before he can be guilty of laches; and the discovery of only a part of the fraud is not sufficient. (12 Am. & Eng. Ency. of Law, 557, 558, 578, 604, 605; *Hallett* v. *Collins*, 10 How. 186; *Allore* v. *Jewell*, 94 U. S. 506–12.) In this case six years held not a bar. This action was brought within two years, and before the statute of limitations could possibly have run. So laches cannot be imputed. (Bigelow on Fraud, 23, 38–40; Kerr on Fraud, 300; 12 Am. & Eng. Ency. of Law, 545; 2 Pomeroy's Equity Jurisprudence, § 965, and note 2, toward end of note; *Lux* v. *Haggin*, 69 Cal. 267.) The defense of laches is an affirmative one, and the burden is upon the defendant to establish it. (Bigelow on Fraud, 136.) The sale was one in which plaintiff might have acquiesced, but she did not do so.

VII. The rule stated in *Robins* v. *Hope*, 57 Cal. 493—that a party is conclusively presumed to know the condition of his title to real estate—is not correct. If correct, it would follow that there could be no relief granted for mistakes as to title, but such relief has many times been granted. (Kerr on Fraud, 398–401, 406, 413, 415; 1 Story's Equity Jurisprudence, § 122 and following, and 130; 2 Pomeroy's Equity Jurisprudence, 847, 848, and notes, 849, especially on p. 314; *Trigg* v. *Read*, 5 Humph. 529; 42 Am. Dec. 447; *Hallett* v. *Collins*, 10 How. 186; *Billings* v. *Aspen Min. etc. Co.*, 51 Fed. Rep. 338.)

HARWOOD, J.—Through this action plaintiff sought and obtained a decree annulling the sale, and canceling the conveyance, whereby defendant John A. Leggat acquired and held title to one-third interest in the Old Glory mining claim, situate near Butte City, in Silver Bow county, Montana, with provision for the restoration of said property to plaintiff, together with the rents and profits obtained therefrom by said defendant while he held the title thereto. The annulled sale and conveyance were made by defendant Roderick D. Leggat, acting as attorney in fact for plaintiff. The grounds for such relief, as alleged in the complaint, and affirmed by the decree,

were false and fraudulent representations and concealments by defendants, acting in collusion, concerning the value, and conditions affecting the value, of said property, whereby they betrayed the trust and confidence which plaintiff had been led to repose in them, and induced plaintiff to accept a grossly inadequate price for said property. From the decree, and the order of the court overruling defendants' motion for new trial, this appeal is prosecuted.

Appellants assign in their brief, and urge in argument, two propositions, on which they insist the judgment is not supported by the evidence, and for which reasons it should be reversed: 1. Because the alleged fraud is not proved as charged in the complaint; 2. Because the proof shows that plaintiff acquiesced in, approved, and ratified said sale and purchase, and received the price paid with full knowledge of all the facts in relation to said property on which she now predicates fraud, and seeks to avoid the transaction. The pleadings and proof must therefore be reviewed from the standpoint of these assignments.

During the times mentioned in these proceedings, plaintiff resided in the state of Missouri, while defendants, her brothers-in-law, resided at Butte City, state of Montana, very near the location of the property in question. Plaintiff sets forth in her complaint that on the 5th of May, 1888, and for two years prior thereto, she was seised in fee and possessed of an undivided one-third interest in and to a certain quartz lode mining claim, known as "Old Glory mining location," situate in said county, etc., giving particular description thereof. That on December 15, 1887, by power of attorney executed and delivered, she appointed and empowered defendant Roderick D. Leggat as her attorney in fact, to manage and sell certain of her real estate situate in Silver Bow county, Montana, and particularly her interest in said Old Glory mining claim, which power was accepted by Roderick D., and continued in force until revoked, in 1888. That such appointment was made because so advised by defendant John A., who, through his correspondence with plaintiff, had pretended to act as her friendly and confidential adviser in respect to her property and affairs in Montana, and particularly her interest in said lode claim, both before and after such appointment, whose state-

ments she believed, and whose counsel she trusted and relied upon, and because of her trust and confidence in both defendants as brothers of her late husband, Alexander J. Leggat. That on or about May 5, 1888, Roderick D., acting as plaintiff's said attorney, sold and conveyed plaintiff's one-third interest in said Old Glory mining claim to defendant John A., for $1,000, a greatly inadequate consideration, for said property was worth at least five times said amount, and was constantly increasing in value. That about the 23d of April, 1888, a short time prior to said sale to John A., a small portion of the surface, only, of said claim, without conveying any rights to the mineral therein, was sold and conveyed to Adam Farrady for $3,000, of which plaintiff's share was $1,500; and both defendants were parties to that conveyance, Roderick D. signing it as plaintiff's attorney in fact. That such fact was concealed from plaintiff by both defendants, and plaintiff discovered the same only within about two weeks before instituting this action. That none of her share of the proceeds of said sale to Farrady was accounted for or paid to her. That a large portion of the town of Centerville, in Silver Bow county, Montana, is built on said mining claim, and all, or nearly all, of the occupants thereof were paying, or had agreed to pay, ground rent to the owners of said claim, which ground rent was worth several thousand dollars per annum; and many valuable buildings are erected on said claim, which, as plaintiff is advised, become part of said property belonging to the owners thereof. That, in addition to the value of the surface ground, the vein of said mining claim is of considerable value. That, until a few weeks prior to the commencement of this action, plaintiff was in complete ignorance of the value of said property, its condition and title. That defendants were plaintiff's only source of information. That they, as plaintiff is informed and believes, and therefore alleges, confederated together for the purpose of concealing from plaintiff the value of said property, and misleading her concerning the same, and thereby to fraudulently induce plaintiff to accept for her interest a grossly inadequate sum; and that, pursuant to such collusion and conspiracy, defendant John A. several times wrote to plaintiff that said claim was the source of much annoyance and expense, was involved in

litigation, and the title thereto was doubtful, and that he was compelled to devote much time, labor, and money to protect the plaintiff's interest therein; and that defendant Roderick D. concealed the true facts in regard to said property from plaintiff, and gave her no correct information thereof. That such statements made by John A., and each and all of them, were false, and known by him to be false, except the statement that he pretended to manage said claim; for, in fact, when plaintiff's interest in said property was conveyed to John A., the title to said claim was good and uncontested, and the ground rents for the occupied portions thereof were of great value, as aforesaid, besides the value of the claim itself, and the value of said property was constantly increasing, as defendants well knew. That such sale of plaintiff's interest was made by Roderick D. to John A., without the knowledge or consultation of plaintiff; but afterwards plaintiff was informed of such sale by letters received from each of the defendants, wherein they stated that $1,000 was all that plaintiff's interest was worth, and that the title thereto was doubtful and in litigation, or threatened with litigation, which statements were false, as both defendants well knew; but plaintiff then relied upon and believed said statements, and, being deceived thereby, was induced to accept $1,000 for said property, whereby defendants defrauded plaintiff, and deprived her of many thousands of dollars of value in said property. That plaintiff only discovered such fraud a few weeks prior to the commencement of this action. That she then tendered back to John A. the sum paid for her interest in said property, with interest since payment, and demanded a reconveyance thereof to her, all of which was refused. That while defendant John A. has held title to said property he has received rents and profits thereof to a large amount, for which plaintiff asks an accounting and judgment, together with a decree compelling the restoration of said property to her.

Defendants made separate answers to the complaint, but very similar in substance. There is no denial of the transfer of said property by Roderick D., acting as plaintiff's attorney in fact, to John A., for $1,000 consideration; nor denial that plaintiff's interest in said property was worth upwards of five

times that sum; nor that defendants were unacquainted with its value, or the circumstances which enhanced its value. As to the alleged sale of a small portion of the surface of said claim to Farrady, it is denied that the proportion of the proceeds of that sale due to plaintiff's interest amounted to $1,500, or any sum greater than $1,000. But defendants specifically deny all the material allegations of the complaint charging them with false representations and fraudulent concealments in reference to said property; and by way of new matter of defense, in support of the good faith of the transaction, defendants allege that John A. Leggat was in fact the equitable owner of said interest during all the time the legal title thereof was held by plaintiff and her late husband, Alexander J. Leggat; that, in the year 1882, John A. conveyed the legal title to said interest to Alexander J. to secure a loan of $200, which the former had borrowed from the latter; that such conveyance was in fact a mortgage, and so considered and intended by the parties thereto, to secure repayment of said sum of $200; that the title to said property was afterwards conveyed to plaintiff, Ruth F., in consideration of her husband's love and affection for her, and for no other consideration; and defendants allege, on information and belief, that plaintiff was "fully aware of the character of said transaction between John A. and her husband, Alexander J., and knew, or ought to have known, that the title which she had to said property was intended as security for the amount due from defendant John A. to Alexander J. Leggat"; that defendant John A. paid the sum of $1,000 to Ruth F., through her attorney, Roderick D., to redeem said property from such pledge as security, and to procure its reconveyance to him; that said sum was greatly in excess of the amount due for such redemption, but on account of his relationship to plaintiff, and his desire to relieve her necessities, John A. paid such liberal sum for the redemption of said interest. All this new matter of defense is specifically denied by plaintiff's replication.

The trial ensued, whereat the respective parties introduced their evidence, argued and submitted the case to the court without asking special findings, and with the understanding that the court, after due deliberation, would determine the case

by a general finding; and thereafter the court returned its general finding in favor of plaintiff, to the effect that all the allegations of her complaint had been established by the proof, and were true; whereupon judgment was rendered accordingly, as aforesaid.

Passing to an examination of the evidence, bearing in mind the assignments of appellants, it must be ascertained: 1. Whether the fraud was proved as alleged; and 2. Whether plaintiff acquiesced in and ratified the sale in question with full knowledge of the facts.

There appears to be no dispute that the conduct of Roderick D., as the attorney in fact for plaintiff, in reference to her interest in question, was a fraudulent betrayal of the trust reposed in him by plaintiff. But as to John A. it is contended there is no showing that he was in collusion with Roderick D., or guilty of any false representations or deceptions in reference to the subject of this action. We find ourselves, however, unable to place that interpretation upon his conduct or his representations in this matter. We find in the evidence, giving it as favorable interpretation towards John A. as it will bear, abundant support for the conclusion reached by the trial court. The attitude assumed by John A. towards plaintiff, as shown in his letters to her after the decease of her husband, Alexander J., seemed to have been calculated to lead plaintiff to place confidence in him, and to rely upon and adopt his counsel in relation to her property in Montana. There is in these letters the appearance and expression of good faith, kindness, and earnest solicitude for the welfare of plaintiff, yet perfect independence and disinterestedness; even more, they exhibit a spirit of chivalrous generosity and magnanimity of one, strong, well informed, and experienced, towards the weak and dependent, mingled with occasional expressions of affection towards the widow and children of a deceased brother. In several voluminous letters written in that spirit to plaintiff, subsequent to her husband's death, and during the year prior to his getting title to said interest in the Old Glory claim, John A. dwells at great length upon the condition of plaintiff's property in Montana; advised the appointment of an attorney, with

full power in reference thereto, and suggested Roderick D. as a proper person for that commission; and, withal, assured plaintiff repeatedly of his desire and intention to aid her and her attorney, to the best of his ability, by his counsel and information in respect to said property. In this respect he wrote, in a letter of February, 1887:

"I have some knowledge of every thing connected with all your property here, and will do, aid, help, and advise, to the uttermost of my power, to assist whoever you appoint, when requested or consulted in regard thereto, for your interests." And again, speaking, evidently, of his own appointment as such attorney, in a letter of July, 1887, he said: "I inclose you power of attorney to sign and acknowledge before a notary public; or, if you think of or desire any one else to act as such, do so at once, and I will help and advise them all I can." And again, in a letter of October, 1887, he observed: "Mining property, especially, needs watchful care and promptness of action. I have suggested, time and time again, that you appoint some one with authority to act for you in matters out here. I have assumed it as far and as long as I could. Your property is being trespassed upon continuously, and no one to say stop." Again, in the same letter, he said: "Now, for the last time, I would suggest that, if you care about the property in this territory, give Rod., or some one, full power to act for you in these matters, or come yourself and look the situation over. Some thing should be done at once. You can rest fully assured that I will render all the help and do all I can to protect and assist your interests, no matter who you have to represent you." Plaintiff appears to have adopted, relied upon, and carried out all these suggestions of defendant John A., to her ultimate disadvantage and loss, and, as it happened, with all his protestations of good faith, kind intentions, and his great solicitude for plaintiff's welfare, her loss was his gain. But his suggestions in reference to the appointment of an attorney, and the good offices he promised to volunteer for the aid and benefit of plaintiff, but never fulfilled, was not all of his conduct which tended to the disadvantage of plaintiff. He accompanied these suggestions with a narration of facts and circumstances tending to depreciate, in plaintiff's estimation, the value of her property

in Montana, and especially the Old Glory mining claim. That claim seems to have been the central point of calamity, vexation, menace, and expense in the gloomy picture drawn by defendant John A. in his letters to plaintiff. In this regard he writes, in a letter of June, 1887: "I had a talk with Mr. Foster in regard to the purchase of your interest here in Silver Bow county in the properties. He did not want to buy, but has concluded, on my urging the matter, to do as I wish should be done. He owns interests in some of it, and as I have all the work, trouble, time, and expense to stand to maintain the title and possession, I feel that I am about weary of it; and I will sell what interest I have in the whole matter at what I can get, and let those that remain in take the responsibilities and worry that I have so long borne without recompense, or hardly thought of thanks from my partners, whose interests I have maintained and protected so long."

"Mr. Foster declines to buy any of my interests, as he deems me a safeguard to his title. All the properties which are embraced in the deed which I inclose are more or less in litigation. The Old Glory especially had a heavy dose of trouble —an unpaid cost of suit in the supreme court, of over two years' standing, and a pending suit against over one hundred people who have squatted on, and now occupy, the ground. None of the properties embraced in deed are producing any revenue, and will not, unless after the expenditure of considerable money to develop them." Again, in his letter of July 24, 1887, having drawn a very discouraging picture in reference to the property in which plaintiff was interested in Montana, and having said, "None of this property is really of any value," he continued: "The Old Glory claim, the title of which is not received from the government, is squatted on by over a hundred houses, on certain claimed titles thereto, which may involve possible bloodshed, or, at least, a long and troublesome lawsuit, to remove." Again, he says, in a letter of October 25, 1887: "Some of the property is valuable, but no one that I know of can do a d—— with it, and it will cost time, money, work, to settle difficulties which have already arisen in regard to much of it. Rod. will possibly tell you how easy it is to guard mining interests here from the encroachments of

designing and dishonest sharpers. Two instances in cases I will mention, which Rod. is cognizant of. The Old Glory has had two expensive lawsuits to maintain to defend its right. The last one, which went to the supreme court, I fought, I defended, and won, without the shadow of authority to do so from either you or Alex. Had this fact been discovered by the opposite parties' attorneys, the case would have been beaten. And now there is another lawsuit looming up, dark and ugly, as the whole claim has been squatted on and built over, there being upward of one hundred houses with families thereon. Suits of ejectment will have to be entered. Trouble, money, and maybe worse, will have to be expended, ere the end is reached." His letters constantly reiterate such depressing and discouraging statements in reference to plaintiff's interests in Montana in general, and as to the Old Glory claim in particular; and these statements are either wholly false, or gross exaggerations. It is true, there was some litigation in respect to said claim, but it does not appear to have been of a very formidable character. The main case, which he speaks of as having gone to the supreme court, was determined in 1885. (*Leggat* v. *Stewart*, 5 Mont. 107.) This case grew out of an adverse claim to the same property, under a location known as the "Raven lode location." Such litigation in respect to mining claims of known or promised value is not uncommon. But the claimants of the Old Glory prevailed in said case in both the trial and appellate courts; and their title seems to have been regarded thereafter as so firmly established that of the one hundred occupants who had built residences thereon, it being in a populous mining district, more than two-thirds of them made terms for ground rent without litigation. Some, however, were recalcitrant, and in 1888 one ejectment suit was instituted against some twenty-eight of them as defendants; but they made no appearance to dispute the right of the owners of the Old Glory claim to assert dominion over the ground they occupied for residences. It is admitted that no other litigation occurred in reference thereto.

The fact that the claim was so situated as to make its surface desirable for residence purposes greatly enhanced its worth to the owners; and the presence of these occupants, about

which so much doleful malediction went forth from John A. to plaintiff, was in fact a source of value and income, for the ground rent they paid is shown to have been six to eight hundred dollars per quarter. But this false and discouraging presentment in respect to said interest, coming from one assuming to act as friend and confidential adviser, and relied upon as such by plaintiff, residing at a great distance therefrom, with no other source of information, was calculated to prepare her mind to gratefully accept a small price for her interest in such unpromising and expensive property. The view he presented is shown by the testimony to have been false. The truth was that said property was valuable, was salable, was yielding a good income, and the tilte of the owners was practically uncontested.

Was there collusion between John A. and Roderick D. in this affair? The facts admit of no other conclusion. The appointment of the latter as plaintiff's attorney to manage and sell her property was suggested by John A. It is true, he was not the only person mentioned for such appointment. Other names were mentioned, but accompanied with some suggestions of doubt as to their availability or willingness to act in that behalf. But the suggestion of the appointment of Roderick D. goes for very little in determining the question of collusion between defendants to mislead or defraud plaintiff, in the respect alleged. That determination proceeds upon the showing of alliance between them, and the co-operation of Roderick D. with John A., to the end that he acquired title to said interest of plaintiff for a grossly inadequate consideration. Acting against the interest of plaintiff, and contrary to his trust and duty as her agent, Roderick D. appears to have espoused the claim of John A., that he was the equitable owner of the interest held by plaintiff in said Old Glory mining claim, on his assertion that he had conveyed it to plaintiff's husband to secure a loan of $200, according to John's "information and belief," as he alleges in his answer, and therefore the legal title ought to be conveyed back to him, on payment of a mere fraction of its value, by way of redemption. Having thus subserviently allied himself with John A., and subscribed to his demands against plaintiff's interest without even consult-

ing plaintiff, Roderick D., through his power of attorney from her, proceeds to invest John A. with the legal title to plaintiff's interest in the Old Glory claim for the payment of $1,000. This was a most convenient and effectual service of Roderick D. to John A. in aid of the consummation of his purpose. But, apparently not satisfied with that service to John A., Roderick D. undertakes to smooth the way for the effectual operation of the scheme by writing false statements to plaintiff in respect to the value of said property, tending to lull her into the belief that she had received all her interest in said property was worth, thus seeking, by falsehood, to aid John A. in quietly holding said interest without remonstrance from plaintiff. To this end, in his letter reporting the transaction to plaintiff, Roderick D. tells her that her title in said claim "was extremely shaky and doubtful; besides, John A. had charge of it, and was doing all the fighting at his own expense"; that he "could not have realized the same amount from any one else," nor from John A. "the day after, for he would not have had the money"; and, continuing, Roderick D. says: "So, I think it was a wise and prudent act, for it saved both you and myself considerable trouble and expense, for, even with a clear title, few men would take it at half the figure."

When Roderick D. wrote these false statements he knew that the title of the owners of the Old Glory claim was good and practically uncontested; that it was valuable, and salable in the market for a sum greatly exceeding $1,000; was yielding rents, so that plaintiff's portion for one year would amount to about as much as the price for which the whole interest was sold to John A.; moreover, that practically, through the perfidy and collusion between himself and John A., the latter was paying the pretended purchase price with plaintiff's own money, derived from her interest in said property; and John A. knew the same while he was availing himself of the fraudulent conduct of Roderick D. to work out the evident design of John A. to get said property for an inadequate price. The conduct of each defendant operated harmoniously and directly with that of the other to accomplish the end ultimately achieved. The acts of each supplemented and combined with

the acts of the other to effect the result attained. We think there is ample showing of collusion; or possibly the more proper designation is, that Roderick D. was the pliant instrument and agent used by John A. along with his own efforts, to work out his will and purpose of obtaining said property for an inadequate consideration. The averment that John A. Leggat was the equitable owner of the interest held by plaintiff in said mining claim, he having conveyed it to Alexander J. Leggat as security for a loan of $200, is contradicted by an array of facts and circumstances which fully supports the implied finding of the trial court that such claim is fictitious. This proof comes principally from the letters of John A. to plaintiff, and her husband, Alexander J., during his lifetime. It is shown that Alexander J. acquired an interest in the mining claim in question, together with interests in other mining property in Montana, through John A. Leggat, by payment of several thousand dollars; and thereafter, during several years, Alexander J., and plaintiff, after his death, paid one-third of the expense of annually representing and otherwise protecting the Old Glory claim, which expense amounts to more than $200, and includes items for personal services by John A. These facts are shown in letters of, and in bills rendered by, John A. It is not likely that if John A. was the real owner, and Alexander J. held that interest for security of the small sum of $200, John A. would have demanded, or Alexander J. have paid for, personal services of John A. in respect thereto. Besides these facts, John A. repeatedly referred to that interest as "your interest in the Old Glory," in his letters to Alexander and to plaintiff, wherein he speaks of the representation, the sale, development, or protection of that claim or interest; and just prior to the death of Alexander, and when that event was imminent, Alexander conveyed said interest in the Old Glory claim to John A., and he immediately conveyed it to plaintiff, with no assertion, reservation, or arrangement showing that John A. was the real owner thereof, and the legal title was held by the others as security for repayment of a small loan; and John A. afterwards, in letters to plaintiff, refers to said interest as her interest, and in no wise intimates that he claimed to own it, until his letter informing plaintiff that he

had *bought her interest.* The proposition that plaintiff acquiesced in, ratified, or approved said sale with full knowledge of the facts is not supported by the record. This is argued from the fact that, immediately after said sale, John A. wrote plaintiff, and having mentioned that there were twenty-eight ejectment suits against squatters and trespassers on the Old Glory alone, said:

"I bought from Rod., your attorney in fact, your title to this Old Glory claim, paying $1,000 cash for your title of one-third interest therein. For the past four years this claim has been in lawsuits, and I am the only one of all interested that fought the fight. The other parties are useless and indifferent, and I had got my blood up to beat the attempted swindle, and carry the war on"; and, after saying more about lawsuits involving said claim, he observes: "The third interest I bought from you I deeded to Alex for a loan of $200, which I sorely needed." Thereafter, Roderick D. sent plaintiff $800, of said price paid, reserving $200 to pay expense in relation to some other interests of plaintiff in Montana. Plaintiff received said money, and did not then repudiate said sale, although she was in possession of the letters of John A. to Alexander J. and herself, which tended to show that John A. was not the equitable owner of said interest. From these facts it is argued that plaintiff was cognizant of all the facts which showed the fraud and imposition, if any was practiced on her, when she received, and retained for several months, the consideration for conveyance of said interest to John A. This conclusion is much broader than the facts disclosed by the record justify. With all the information and sources of information which plaintiff had in the letters of John A. and Roderick D., there was no showing that she had been imposed upon or defrauded. They had informed her to the contrary. And what difference did it make to her that John A., without just ground therefor, asserted that he was the equitable owner of said interest, if he had bought her interest, and paid plaintiff all it was worth, and more than any other one would pay? It was through subsequent investigation, outside of the information which plaintiff had when she received said purchase price, that she discovered the fraud and imposition which she had suffered.

Her main enlightenment was in the discovery of the fact that her interest in said claim was worth several thousand dollars more than that represented by Roderick, and paid by John A. therefor; that it was yielding a large revenue; that a small part of her interest had been sold, before the conveyance to John, for all that he paid therefor; that the statements that a large number of lawsuits were pending, and others were threatened, and looming up "dark and ugly," of "war," danger of "bloodshed," of large expense to defend, of "shaky title," etc., in respect to said claim, were false statements or gross exaggerations. But when said purchase price was sent her, accompanied and preceded by such false statements, she did not know they were false, but it appears she believed them, and was misled and deceived by them. It cannot be maintained that plaintiff received and retained such purchase price, for some time, with full knowledge of the facts.

The exceptions saved in the record as to the admission of certain evidence were not insisted on in the argument by appellants' counsel. Our investigation of the record finds abundant support of the decree. It will therefore be affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

PENN PLACER MINING COMPANY, RESPONDENT, v. SCHREINER ET AL., APPELLANTS.

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[Submitted Decided February 19, 1894.]

NEW TRIAL—*Statement—Extension of time.*—Where the time for filing a statement on motion for a new trial, or for doing any act of court practice, is extended "to" a certain date, the date named is included within the period prescribed.

SAME—*Amendments—Engrossment.*—A statement on motion for a new trial will not be disregarded because amendments thereto are not engrossed in the record, but occupy a separate position at the close of the statement, where such amendments comprise additional matter which is complete and intelligible in itself.

SAME—*Motion to strike out.*—Motion to strike from the record the statement on motion for a new trial because the evidence was not all reduced to narrative form denied in this case.

Appeal from Fourth Judicial District, Jefferson County.

ON MOTION to strike from the record the statement on motion for a new trial. Denied.

McConnell, Clayberg & Gunn, for the motion.

Where the language of an order is "time extended to" a certain date the language is clearly exclusive of that date. The word "to" "is opposed to from, and, in most of its uses, is interchangeable with 'unto.'" (Webster's Dictionary; *People* v. *Robertson*, 39 Barb. 9.) The time for serving statement on motion for a new trial having expired on the first day of December, 1891, the granting of a further extension on December 2d was of no validity, and, the statement having been served on the eighth day of December, was not within the proper time. (*Bear River etc. Mining Co.* v. *Boles*, 24 Cal. 354; *Jenkins* v. *Frink*, 27 Cal. 337; *Campbell* v. *Jones*, 41 Cal. 518; Hayne on New Trial and Appeal, § 147, p. 413.) The amendments proposed to the statement on motion for a new trial are tacked on at the end of the statement; and the statement has never been properly, or at all, engrossed. Such a statement has no place in the transcript on appeal. (*Kimball* v. *Semple*, 31 Cal. 658; *Bush* v. *Taylor*, 45 Cal. 112; *Fant* v. *Tandy*, 7 Mont. 443.)

Toole & Wallace, Contra.

The word "to," or "till," or "until," when used in an order of court, is inclusive. (*Bunce* v. *Reed*, 16 Barb. 347, 352; *Dawkins* v. *Wagner*, 3 Dowl. Pr. 535; *Houghton* v. *Boisaubun*, 18 N. J. Eq. 318; *Delorme* v. *Ferk*, 24 Wis. 202.)

HARWOOD, J.—This case stands on motion to strike from the record the statement on motion for new trial: 1. Because the statement on motion for new trial was not served within the time prescribed by the statute, or within the period of time provided by order of court. This alleged ground is based upon the respondent's construction of the order of court extending time. They insist that where the court, by order, extends time *to* a date named, as "to December 2d," the period of extension expires at the close of the day preceding the date named in the order, in this instance at the close of December

1st, because December 1st reaches to December 2d. We think the contemplation of such an order of court, or stipulation providing time to a certain date, within which to do an act in court practice, such as the filing or service of a paper, includes the date named, as the close of the period prescribed. 2. It is contended that service of statement on motion for new trial was not made in time, although made within the period stated in the order of court extending time to file statement. The order extending time reads: "For filing statement on motion for new trial"; and it is contended that this order did not suffice to extend the time for *service* of said statement. The record shows that service of statement was waived by telegram from respondent's counsel to appellants' counsel, on the first day of December—the day the order of the court was made extending time to "file statement." This telegram was made part of the record by amendment, allowed by the trial court, accompanying the objections to the settlement and allowance of the statement, on the alleged ground that it was not served in time.

It is further urged that the statement on motion for new trial should be disregarded by this court, because the evidence is not entirely reduced to narrative form; and that the amendments are not engrossed in the record, but occupy a separate position at the close of the statement on motion for new trial. These amendments embody several instructions given to the jury by the court—the special findings of the jury; some estimates used by counsel in argument of the case, which the jury was, by agreement of counsel, allowed to take to the jury-room; some record entries in relation to notice of motion for new trial, extending the time for preparation of statement, etc., together with objections to the settlement and allowance of statement inserted in the record, and made part thereof, by way of amendment allowed by the court. All these amendments comprise additional matter, complete and intelligible in itself, and not of the character referred to in the case of *Gallatin Canal Co.* v. *Lay*, 10 Mont. 528. Apparently no greater convenience or certainty would result from these amendments being in one part of the statement instead of another.

As to the objection that the testimony is not all in narrative

form, other records have offended more grievously on that score than this one, and yet have been tolerated by this court. This record may be subject to some criticism on the ground that the testimony is not all reduced to narrative, but it is well understood that there are examples of testimony very difficult to reduce to narrative form without losing or gaining some force thereby, and where such is the case this court has been in the habit of indulging the statement of evidence by question and answer, as given on the trial. It is somewhat hard to draw the line between the cases which should, and those which should not, be dismissed on this particular ground. It is a ground which the court should, and will, act upon of its own motion. And when admonition is unheeded, and the abuse exceeds a just indulgence extended to litigants, unaware of the improper practice, rather than to counsel, who are the real offenders, we shall then apply the pruning-knife of dismissal, to sever from this appellate jurisdiction such records as unwieldy, cumbrous, and improper engraftments thereon. From our examination of this record we do not consider it one which should be thus dealt with. The motion to strike out the statement, in our opinion, should be overruled. An order will be entered accordingly.

Motion overruled.

PEMBERTON, C. J., concurs.

WHITTAKER, RESPONDENT, v. CITY OF HELENA, APPELLANT.

[Submitted March 22, 1893. Decided February 19, 1894.]

NEGLIGENCE—*Driver of vehicles.*—The negligence of the owner and driver of a private vehicle is imputable to one voluntarily riding with him by invitation, and defeats the right of the latter to recover damages against a city for injuries caused by its negligence when such driver was guilty of contributory negligence.

Appeal from First Judicial District, Lewis and Clarke County.

THE cause was tried before BUCK, J., who denied defendant's motion for new trial. Reversed

Sydney H. McIntire, City Attorney, for Appellant.

I. The theory of the defense all the way through this case was that, if the obstructions to Grand street were permitted to remain there, the city having enacted ordinances prohibiting obstructions to the public streets, and making it the duty of the public police officers to remove such obstructions, the failure or neglect of such officers to do their duty in the premises would not make the city liable for any accidents occasioned thereby. The law is well settled that a municipal corporation is not liable for the willful and unlawful conduct or neglect of a clear duty of the police officers; that such police officers are the conservators of the public peace and agents of the public at large and citizens of the entire state, and not in any sense agents of the municipal corporation, even though the municipal corporation employs and pays them; they cannot bind the corporation by any act of theirs, or cast upon it any liability for their misconduct or failure to perform their duty; and in no sense has the doctrine of *respondeat superior* been held to apply in classes of cases similar to the one at bar. (*Peters* v. *City of Lindsborg*, 40 Kan. 654; *Wheeler* v. *City of Plymouth*, 116 Ind. 158; 9 Am. St. Rep. 837; *Weller* v. *City of Burlington*, 60 Vt. 28; *Hines* v. *City of Charlotte*, 72 Mich. 278; *Calwell* v. *City of Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Little* v. *Madison*, 49 Wis. 605; 35 Am. Rep. 793; *Schultz* v. *Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Cole* v. *Newburyport*, 129 Mass. 594; 37 Am. Rep. 394; *Board of Trustees* v. *Schrader*, 58 Ill. 353; *Worley* v. *Inhabitants etc.*, 88 Mo. 106; *Prince* v. *Lynn*, 149 Mass. 193; 2 Dillon on Municipal Corporations, § 975; *Lafayette* v. *Timberlake*, 88 Ind. 330; *Norristown* v. *Fitzpatrick*, 94 Pa. St. 121; 39 Am. Rep. 771.) There was no proof of negligence on the part of the defendant, or any of its agents, in this case, and the motion for nonsuit should have been granted.

II. The obstruction in the street must be the proximate cause of the injury to render the city liable. It was not in this case. The city cannot be held liable for injuries occasioned by wild, skittish, or runaway horses. The witness Dunn tried to make out that his horse was not easily fright-

ened, but the fact remains that he was. This case seems to be similar to *Agnew* v. *Corunna*, 55 Mich. 428; 54 Am. Rep. 383; *Bluffton* v. *Mathews*, 92 Ind. 213; *Pullman Palace Car Co.* v. *Barker*, 4 Col. 344; 34 Am. Rep. 89; 2 Thompson on Negligence, 1098; 2 Dillon on Municipal Corporations, § 1015; *Titus* v. *Northbridge*, 97 Mass. 258; 93 Am. Dec. 91; *Stone* v. *Hubbardston*, 100 Mass. 54. The proximate cause of this injury was unquestionably the conduct of the horse, and Dunn's inability to manage him while frightened and shying.

III. For injuries sustained from licensed exhibitions rendering streets unsafe through the failure of police officers to remove them, the city would not be liable. (2 Dillon on Municipal Corporations, § 1011 *a; Little* v. *Madison*, 49 Wis. 605; 35 Am. Rep. 793; *Cole* v. *Newburyport*, 129 Mass. 594; 37 Am. Rep. 394; *City of Warsaw* v. *Dunlap*, 112 Ind. 576.)

IV. The evidence seems to show that Dunn was heated at his discussion in the council, and purposely put himself into a position of danger, with full knowledge of what he was doing. Should the city be held responsible for his reckless acts in courting this accident? Certainly, in his own case, he could not recover damages for his injuries, if any, because he contributed directly to the result. And there are authorities holding that the plaintiff was in the same position and is governed by the same rules. (*Otis* v. *Janesville*, 47 Wis. 422; *Prideaux* v. *Mineral Point*, 43 Wis. 513; 28 Am. Rep. 558; *Lake Shore etc. R. R. Co.* v. *Miller*, 25 Mich. 274; *Houfe* v. *Fulton*, 29 Wis. 296; 9 Am. Rep. 568.)

F. Adkinson, and *John S. Miller*, for Respondent.

That the city is liable for damages upon the facts shown by the testimony, see American and English Encyclopedia of Law, volume 9, page 386, and authorities therein cited. The negligence of Dunn, if any, could not be imputed to the plaintiff, and the proof is uncontradicted that the plaintiff did not know of the existence of the tent until they came upon it, while there are some authorities which sustain the instruction of the court upon this point, the great weight of them is to the contrary. But however this may be, the instruction was not prejudicial to the appellant, and is not one of which the city

can complain. (*Metcalf* v. *Baker*, 11 Abb. Pr., N. S., 431; *Robinson* v. *New York Cent. & H. R. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1; *Dyer* v. *Erie Ry. Co.*, 71 N. Y. 228.)

PEMBERTON, C. J.—This is an action to recover damages for personal injuries sustained by plaintiff by being thrown from a buggy in the streets of said defendant city. Among other things, the complaint alleges, substantially, that on the thirtieth day of August, 1890, and for some days prior thereto, the defendant wrongfully and negligently authorized and permitted a certain show to be maintained and conducted in a tent, or canvas-covered wagon, on Grand street, in said city; that said show was such an obstruction as to render travel along said street unsafe and dangerous, and was of such character as to frighten gentle and well-broken horses driven along said street; that on said thirtieth day of August plaintiff was riding in a buggy drawn by a safe and gentle horse, which was being driven with due care and caution along said street, when said horse, without any fault or negligence of plaintiff, became frightened at said show tent or wagon, became unmanageable, and ran away, upsetting said buggy and throwing plaintiff to the ground with great force, whereby he was greatly injured and damaged; that plaintiff, in the lawful transaction of his business, had necessarily to pass along said street. The allegations of the complaint are denied by the answer. The case was tried in the court below with a jury, and resulted in a verdict for the plaintiff for one thousand dollars, for which sum judgment was rendered. Defendant moved for new trial, which was denied. This appeal is prosecuted from the judgment and order denying the motion for new trial.

The evidence clearly shows that the plaintiff, at the time of the accident set forth in his complaint, was riding with one James S. Dunn, who owned the buggy and horse, and was driving the same. Dunn, it seems, was on his way to lunch, and invited plaintiff, who lived in the same part of the city, to ride with him, as it seems he did almost every day prior thereto. The evidence does not show that plaintiff knew of the existence of the alleged obstruction to travel on the street, but Dunn swears that he knew of it. Dunn was, at the time,

an alderman of the city. It appears from that evidence the the accident to plaintiff occurred at about one o'clock, P. M., on the thirtieth day of August. At twelve, M., of said day there was a meeting of the city council of said city. Dunn swears that he was at that meeting, and in an earnest and excited manner called the attention of the council to the fact that this show in the tent or wagon was located and doing business on Grand street, and also called the attention of the council to its dangerous character; that the mayor stated that he would see to its removal at once; that thereupon the council adjourned, and that he went immediately to Edwards street, got his horse and buggy, drove to Main street, took the plaintiff into his buggy, as he was in the habit of doing every day, and started up Grand street, and, in attempting to pass this tent or wagon, the accident happened which resulted in plaintiff's being injured and damaged; that the tent or wagon was on one side of the street, and a pile of rock the city was using in work on the street was on the opposite side of Grand street from the tent or wagon; that, in attempting to pass between the tent or wagon and said pile of rock, the horse became frightened, and ran the buggy over the rock pile, turning the buggy over, throwing the occupants out, and inflicting upon the plaintiff the injuries for which he sues in this action. This evidence of Dunn is in no way questioned. That he knew the obstructed and dangerous condition of Grand street (if it was in a dangerous and obstructed condition) when he drove upon it is beyond dispute. Under this state of facts, could Dunn recover if he were prosecuting this suit against the city? If he could not recover, can this plaintiff, who was voluntarily riding with him in his buggy, recover? Was Dunn guilty of such contributory negligence as would defeat his right to recovery, when he drove upon the street, knowing the condition thereof? If so, was his negligence imputable to the plaintiff, so as to defeat a recovery on his part?

In *Prideaux* v. *Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, a case involving the question under discussion, the court says: "One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts

the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. When *paterfamilias* drives his wife and child in his own vehicle, he is surely their agent in driving them, to charge them with his negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the discretion of each against negligence affecting the common safety. One enters a public conveyance in some sort of moral necessity. One generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway; to the care and skill exercised in all other vehicles upon it; to the care and skill governing trains at railroad crossings; to the care and skill of every thing except that which is most immediately important to himself—and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels; nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view. . . . . A woman may, and should, refuse to ride with a man if she dislike or distrust the man, or his horse, or his carriage. But, if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but, as to third persons, the man is her agent to drive her—she takes man, and horse, and carriage for the jaunt; for better, for worse." *Otis* v. *Town of Janesville*, 47 Wis. 422, 2 N. W. Rep. 783, is to the same effect.

In *Lake Shore etc. R. R. Co.* v. *Miller*, 25 Mich. 274, a case

involving the question whether or not the negligence of the driver of a private team was imputable to one who was riding voluntarily with the driver, Mr. Chief Justice Christiancy, speaking for the court, says: "The materiality of this question must depend upon another—whether the plaintiff's own negligence or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit. as was properly held by the court."

These authorities all hold that if the negligence of the party injured, or of his driver, which is imputed to him, materially contributed to the injuries, he cannot recover, although the party complained of has not been free from negligence. In the case at bar it seems clear that Dunn was not only guilty of contributory negligence, but that he was reckless in driving into a street which he swears he knew to be dangerously obstructed. His negligence must be held as imputable to plaintiff. If Dunn could not recover under the facts and circumstances of the case, neither could the plaintiff, although the defendant may have been guilty of negligence on its part, which it is not necessary in this case to determine. There are other assignments of error in the record, but we do not consider it necessary to consider them, as we think the treatment above decisive of the case. The court below recognized the law as stated above as applicable to this case, and so declared it to the jury in the instructions given. But the verdict seems to us to have been rendered in disregard of the law as given by the court, as well as of the evidence in the case. We think the court should have granted, for these reasons, the motion of the defendant for a new trial.

The judgment is therefore reversed, and cause remanded for new trial.

Reversed.

HARWOOD, J., concurs.

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COCKRILL, RESPONDENT, v. DAVIE ET AL., APPELLANTS.

[Submitted February 23, 1893. Decided February 19, 1894.]

BUILDING CONTRACT—*Construction.*—An agreement in a building contract to "provide and furnish all material and to do all labor" is not fulfilled unless the material and labor are paid for by the contractor.

SURETIES—*Liability—Failure of principal to sign.*—Sureties upon a bond cannot escape liability upon the ground that their principal did not sign it as it was understood he should, where the liability of such principal is already fixed by contract or by operation of law. (*Wibaux* v. *Grinnell Live Stock Co.*, 9 Mont. 154; *Boskins* v. *White*, 13 Mont. 70; *Woodman* v. *Calkins*, 13 Mont. 363.)

SAME—*Failure of principal to sign—Delivery.*—In an action against a surety on a bond which the principal failed to sign, the plaintiff is not obliged to show an express understanding by the surety that the bond should be delivered and have effect without the principal's signature, where the principal's liability is already fixed by another contract.

SAME—*Judgment—Appeal.*—In an action against two sureties on a bond where the action was erroneously dismissed as to one, this court will, on an appeal by the surety against whom judgment was rendered, reverse the order of dismissal, and modify the judgment, by providing that it shall not determine the right of the appellant to enforce contribution of his cosurety, and that the case may be opened at the instance of either the plaintiff or appellant to determine such cosurety's liability on the bond.

Appeal from Eighth Judicial District, Cascade County.

ACTION on bond. The cause was tried before BENTON, J. Plaintiff had judgment below. Modified and affirmed.

Thomas E. Brady, and *A. J. Shores*, for Appellants.

There is a great diversity of judicial opinion as to whether an action can be maintained against the sureties upon a bond where the principal has failed to sign. In the case of *Ney* v. *Orr*, 2 Mont. 559, this court held that a bond unsigned by the principal whose name appeared in the body of the instrument as such was an incomplete instrument. The following decisions are to the same effect: *Bunn* v. *Jetmore*, 70 Mo. 228; 35 Am. Rep. 425; *Sacramento* v. *Dunlap*, 14 Cal. 421; *People* v. *Hartley*, 21 Cal. 585; 82 Am. Dec. 758; *Bean* v. *Parker*, 17 Mass. 604; *Wood* v. *Washburne*, 2 Pick. 24; *Sharp* v. *United States*, 4 Watts, 21; 28 Am. Dec. 676; *Fletcher* v. *Austin*, 11 Vt. 447; 34 Am. Dec. 698; *Johnson* v. *Erskine*, 9 Tex. 1; *Russell* v. *Annable*, 109 Mass. 72; 12 Am. Rep. 665; *Cavanaugh* v. *Casselman*, 88 Cal. 549; *Hessell* v. *Johnson*, 63 Mich. 623;

6 Am. St. Rep. 334; *Hall* v. *Parker*, 37 Mich. 590; 26 Am. Rep. 540; *Johnson* v. *Kimball Township*, 39 Mich. 187; 33 Am. Rep. 372; *Board of Education* v. *Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767, and cases cited; *Ferry* v. *Burchard*, 21 Conn. 602; *Wild Cat Branch* v. *Ball*, 45 Ind. 213. Some courts have held that while such an instrument was upon its face incomplete, it was, notwithstanding, competent for the obligee to show that the instrument was delivered by the sureties with the intent that it should take effect without the signature of the principal. (*Cavanaugh* v. *Casselman*, 88 Cal. 549.) There are still other cases holding that the obligation is a valid one, and may be enforced, and that it is immaterial whether the sureties intended that the principal should sign or not. (*Kurtz* v. *Forquer*, 94 Cal. 91; *Douglas County* v. *Bardon*, 79 Wis. 641.) For fifteen years contracts have been controlled by the decision in *Nye* v. *Orr*, 2 Mont. 559, and when the sureties in this case affixed their names to this instrument, they had the right to rely upon this long established doctrine of the law that there could be no liability resting upon them unless and until the instrument was executed by Davie. This unquestionably established the law of the state at the time when Renner and Cornelius affixed their signatures to this bond. It is the law of the state to-day. It is difficult to distinguish between the binding force of a rule of law established by judicial decision and long acquiesced in and a rule embodied in a legislative enactment. It has frequently been held that a change in the interpretation of a statute will affect only subsequent contracts. (*Louisiana* v. *Pillsbury*, 105 U. S. 294; *Douglass* v. *Pike County*, 101 U. S. 686.)

Leslie & Downing, for Respondent.

The bond sued on in this action is joint and several. Any or all of the sureties might be included in the action at the option of the plaintiff where several persons are named in the body of an instrument as parties thereto. It is not necessarily invalid as against those who have signed it because others named have not signed. (*Kurtz* v. *Forquer*, 94 Cal. 91; *People* v. *Love*, 25 Cal. 523; *People* v. *Evans*, 29 Cal. 436; *People* v. *Stacy*, 74 Cal. 373; *Mendocino County* v. *Morris*, 32 Cal. 148;

Wibaux v. *Grinnell Livestock Co.*, 9 Mont. 154.) The case of *Nye* v. *Orr*, 2 Mont. 559, is not similar to the case at bar. In that case, aside from the fact that it was an appeal bond, at the trial the sureties offered evidence showing that the bond was delivered by them to the probate judge, with directions not to file the same until one Kay signed. That the judge promised so to do, but filed the bond without Kay's signature, and that the sureties did not know it was filed until the appeal had been determined. The court very properly held that the evidence of this should have been admitted, and the sureties not liable. When part only of those mentioned in a joint and several bond executed, those who did execute it will be bound, unless they signed upon condition that they were not to be bound unless the other sureties named therein also sign, and unless this condition is brought to a knowledge of the obligee. (*Douglas County* v. *Bardon*, 79 Wis. 641; *Kurtz* v. *Forquer*, 94 Cal. 91; *People* v. *Stacey*, 74 Cal. 374; *City of Los Angeles* v. *Mellus*, 59 Cal. 444; *People* v. *Love*, 25 Cal. 521; *People* v. *Evans*, 29 Cal. 430; *Whitaker* v. *Richards*, 134 Pa. St. 191; 19 Am. St. Rep. 684; *Bollman* v. *Pasewalk*, 22 Neb. 761; *State* v. *Bowman*, 10 Ohio, 445; *Gibbs* v. *Johnson*, 63 Mich. 671; *Goodyear Dental etc. Co.* v. *Bacon*, 148 Mass. 542; *Trustees etc.* v. *Sheik*, 119 Ill. 579; 59 Am. Rep. 830; *Parker* v. *Bradley*, 2 Hill, 584; *Loew* v. *Stocker*, 68 Pa. St. 226; *Keyser* v. *Keen*, 17 Pa. St. 327; *Grim* v. *School Directors*, 51 Pa. St. 219; *Haskins* v. *Lombard*, 16 Me. 142; 33 Am. Dec. 645; *Smith* v. *Peoria County*, 59 Ill. 414; *Herrick* v. *Johnson*, 11 Met. 34; *State* v. *Peck*, 53 Me. 284.)

Preston H. Leslie, also for Respondent.

HARWOOD, J.—It appears that plaintiff entered into a contract, evidenced by writing, with defendant Davie, whereby the latter agreed, for a certain consideration to "provide and furnish all material, and do all labor necessary to the erection and completion of a two-story frame dwelling-house" for plaintiff, according to certain plans and specifications, made part of the contract. To guaranty the fulfillment of that contract, a bond was executed by defendants Renner and Cornelius, and

delivered to plaintiff, in the sum of two thousand five hundred dollars, referring to said contract, and conditioned that "if the said Davie shall well and truly furnish said material, and construct said house, as per said contract, and in all things fully do and perform his part of said contract, constructing said house within the time specified, according to said plans and changes in the designs as said Cockrill may demand of him, then the above obligation is to be void; otherwise, to remain in full force and virtue." The building appears to have been constructed by Davie, and plaintiff paid him a considerable portion of the contract price therefor; but Davie failed to pay for certain labor and materials which he procured and used in the construction thereof, by reason of which default certain liens were applied and enforced against said property, the which Cockrill was obliged to pay in order to save his property from sale, under judgment of foreclosure to satisfy such liens. Whereupon Cockrill undertook, by this action, to recover from defendants the amount he was thus compelled to pay by reason of Davie's failure to carry out said contract to furnish the material and labor for the construction of said house. Defendants Renner and Cornelius appeared, and, their demurrer to the complaint having been overruled, answered, putting in issue material allegations of the complaint, and alleging as a defense that they signed the bond upon the express understanding and arrangement between all the parties concerned that it should not be delivered or have effect without the signature of the defendant Davie. The trial resulted in judgment against Renner alone for ten hundred and eleven dollars and fifty-four cents, and he prosecutes this appeal therefrom, as well as from an order overruling his motion for new trial.

Appellant insists that the bond in question is wholly void because Davie, named therein as principal, did not sign it along with the sureties. But, after much consideration of this subject and the authorities, we cannot sustain that view. The same obligation was fixed upon Davie by another contract, and Renner and Cornelius undertook and promised, in writing, to answer for the default of Davie in respect to his engagements by virtue of that contract, which the sureties described in their bond. This bond was a collateral engraftment upon the building con-

tract, whereby these sureties took upon themselves the burden of answering for any default which Davie might make in respect to his obligation thereunder. As to such obligations, where the liability of the principal is fixed by contract or by operation of law, the sureties who guaranty the fulfillment of that obligation cannot avoid their obligation because the principal did not sign the bond with them. There is no reason or principal of law, or substantial right involved, which should lead to such a ruling; and the same, we think, without doubt, would be against the contemplation, understanding, and purpose of the contracting parties, because the sureties in such a case neither gain nor lose any substantial right by reason of the principal signing, or omitting to sign, such undertaking, which he procured on his behalf. On the other hand, under a different species of bond, where the principal was bound only by virtue of his executing the bond, a different ruling would be applicable on such a defense. We think sufficient has been said on this point in *Wibaux* v. *Grinnell Live Stock Co.*, 9 Mont. 154; *Hoskins* v. *White*, 13 Mont. 70; *Woodman* v. *Calkins*, 13 Mont. 363.

Appellant further contends that, because there was no provision in the building contract specially requiring Davie to pay for the labor and material put into the construction of the building, his obligation was fulfilled by furnishing the same, and was not broken by his failure to pay therefor, and leaving the building, and also the lot on which it was erected, subject to sale to satisfy demands for said materials and labor. This interpretation of the contract, we think, is untenable. Parties are deemed to contract in view of the law relating to the subject of the contract. Davie fell short of furnishing the material for the structure, as contemplated by his contract, when he merely obtained and used such material in the structure, leaving upon plaintiff the burden of paying therefor. That was not furnishing the material and labor according to the terms of the contract, any more than one would fulfill a contract to convey a piece of land to another by making a good and sufficient deed therefor in form, while the title to the land in no manner passed by such deed. (*Colburn* v. *Northern Pac. Ry. Co.*, 13 Mont. 476.) It is contended that plaintiff should

have withheld payment of the installments for such building until receipted bills for all labor and material used therein were delivered to him. We find no force in this proposition, when considered in the light of the facts and the terms of the contract. According to the contract, plaintiff was required to pay certain installments as the erection of the building progressed; and, as to the last installment of upwards of eight hundred dollars, it is provided that it shall be paid "when said house is completed entire, and accepted by the party of the first part, and receipted bills for all material and labor in the construction of said house shall be furnished to said party of the first part by said second party." It appears that plaintiff did withhold payment of the last installment, and applied the same on the judgment for enforcement of said liens.

During the trial, at the close of the introduction of evidence on behalf of plaintiff, the court overruled a motion for nonsuit interposed on behalf of both defendants Renner and Cornelius, but granted a motion to dismiss the case as to defendant Cornelius, leaving the case to proceed against Renner. As we understand from the record and briefs of counsel, this ruling was made because plaintiff was unable to prove that Cornelius signed the bond with the understanding that it should be delivered and have effect without the signature of Davie, the principal named therein. In our opinion it was not necessary to show an express understanding to that effect outside of the bond. Substantially, all that proposition implies is that Cornelius admits he signed the bond, intending to be bound according to its terms, if the principal Davie was likewise bound along with him. Sufficient answer to that proposition is that, under the law and the facts, Davie is bound as principal to discharge those very same obligations which the sureties, through the bond, guaranteed he would discharge; otherwise, the sureties would not be bound for his default. For, if the principal was not bound to do the thing in question, there could be no default on his part, and hence no liability on the part of the surety; because the surety is only bound to answer for the default of the principal named in the bond in respect to those things which the principal was bound by the contract to perform. The contract is described in the bond

sufficiently to identify it, and we must go to that contract to find what Davie, the principal, was obligated to do, as well as to find what the sureties guaranteed he would do. Can any one, therefore, doubt that Davie was bound as principal, along with the sureties, to discharge the obligation before they could be asked to recompense for his default? Davie was sued in this action along with the sureties; and, if served, can any one doubt judgment would go against him, as well as the sureties, for the same damage? His liability and his default must first be shown before judgment can go against his surety.

Both parties to this appeal insist that the court erred in dismissing Cornelius, and giving judgment alone against Renner. When the case was dismissed as to Cornelius, Renner moved again for dismissal as to himself, because it clearly appeared that he refused to sign the bond unless accompanied in that obligation by Cornelius; and when Cornelius was dismissed, as defendant in the suit, because the court held there was not sufficient showing to bind him, that gave peculiar force to the showing that Renner refused to engage in said obligation unless joined therein by Cornelius.

But, while respondent's counsel claim that the court erred in dismissing Cornelius, they say they are satisfied with the judgment as it stands against Renner, and insist that appellant cannot complain of it, because the obligation sued on—that is, the bond—is a joint and several obligation. Respondent's counsel may be right in their position that, under the law and the terms of the obligation sued on, they have a right to proceed against one surety alone. But in this case they have proceeded against both sureties, and it has been adjudicated and determined in this action that the cosurety with appellant is not liable. If this determination is erroneous, as both appellant and respondent insist, and as this investigation leads us to conclude, then appellant has serious reason for complaint. The liability of his cosurety to share the burden of loss by reason of Davie's default has been removed by this adjudication; and, while such determination stands, appellant would be unable to compel contribution from his cosurety, which would not be the case if one surety had been proceeded against severally. On this point, alone, we think the court erred.

Therefore, while the judgment of the trial court entered in favor of plaintiff against Renner may properly be affirmed, it should be so modified as to provide that nothing therein, or in any proceeding of the trial court in said action, shall be construed to determine either the rights of plaintiff against defendant Cornelius or the rights of defendant Renner against said Cornelius as his cosurety on the bond sued on; that the order of nonsuit or dismissal, entered in favor of Cornelius, be reversed and set aside, and that the case may be opened for further proceedings, at the instance of either plaintiff or Renner, against defendant Cornelius, to ascertain and determine his liability therein. The order of this court will be entered accordingly.

Judgment modified and affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

CASE, RESPONDENT, v. SCHOOL DISTRICT No. 3, MISSOULA COUNTY, APPELLANT.

[Submitted . Decided February 26, 1894.]

CONTRACTS—*Construction—Schoolteacher.*—An engagement as a "supply teacher" at seventy dollars per month for a term of ten months, and plaintiff's acceptance thereof cannot be construed as a contract by which plaintiff was to receive a salary of seventy dollars a month for the entire term without regard to whether she actually rendered any services or not, but rather that plaintiff was to be paid for the time she taught at the rate of seventy dollars per month, it appearing that plaintiff was only called upon to teach several days during the first four months, and that during that time she made no demand for such salary, though knowing that the regular teachers were paid at the close of each school month, nor any inquiry as to the understanding of the trustees in respect to her compensation; there also being evidence that during the first month of the term she applied for appointment as a regular teacher in one of the schools of the district for which the salary was seventy dollars per month.

Appeal from Fourth Judicial District, Missoula County.

ACTION upon an account. Judgment was rendered for the plaintiff below by BRANTLEY, J. Plaintiff's motion for new trial granted. Reversed.

Henry C. Stiff, for Appellant.

Webster & Wood, for Respondent.

HARWOOD, J.—This action is founded on an account wherein plaintiff demands of defendant school board two hundred and eighty dollars for four months' services as school teacher in district No. 3 of Missoula county. That demand is made under an alleged contract of employment of plaintiff by the board of trustees of said school district at the compensation of seventy dollars per month. Payment of the demand being refused, this action was brought to enforce the same; and in the justice's court, where the action was first prosecuted, plaintiff recovered judgment against said school district in the sum of one hundred and eighty dollars. From that judgment defendant appealed to the district court of said county, wherein the case was tried to the court, a jury having been waived; and upon consideration thereof the court found plaintiff entitled to recover the sum of twenty-four dollars and fifty cents on her demand against said school district, for services rendered under the contract of employment in question, and entered judgment accordingly. Thereafter, motion for new trial was granted on a statement of the case containing all the evidence offered. From that order the trustees of said school district appealed to this court, insisting that there is not sufficient ground shown to justify the order granting a new trial. This we conclude, upon careful consideration of the case, must be sustained, for we are unable to find in the record a sufficient showing to warrant an order granting a new trial.

The record purports to contain a transcript of all the evidence offered on the trial. It is not claimed that there is any newly discovered evidence; nor is it urged that the court erred in any ruling; nor is there any conflict in the evidence, except some slight difference between the testimony of plaintiff and that of her principal witness. The motion for new trial is founded upon the proposition that the decision of the court upon the trial is not warranted by the evidence, and therefore, if a new trial were granted, and the same evidence submitted again, the court or jury, on consideration thereof, ought to

arrive at a different decision. The question, then, is narrowed to the consideration whether a different decision, under the law applicable to the facts as presented, should be made, or could be sustained if made; and our investigation leads us to a negative conclusion on that proposition. It is not a question of the weight of evidence, or the belief which ought to be accorded to, or withheld from, the testimony of witnesses. All the material and important facts are practically conceded, according to this record; and the real question now is, shall these facts be interpreted, and given the effect in law, as respondent contends, or as appellant urges?

The record discloses the following facts: In the spring of 1891 plaintiff applied to the board of trustees of said school district for a position as teacher in one of the schools thereof at the succeeding term, to commence on the 1st of the following September, in her application expressing her preference for a position in the primary department. Plaintiff's application, with others, being referred to a committee of said board, designated as "Committee on Teachers and Salaries," that committee elected from the applicants a full corps of teachers for the district for the term of ten months, commencing with the month of September of that year, without selecting plaintiff as one of the regular teachers; but she was chosen as "supply teacher," and in the report of said committee, after naming the several teachers chosen, and the amount of the salary of each, respectively, it contained the following: "Supply teacher, Mary Case, salary per month, seventy dollars." This report of the committee was adopted by said board of trustees. Soon after that event plaintiff was, by letter from the clerk of said board, notified of her selection as supply teacher at the compensation mentioned, requesting her in such notice to signify her acceptance of the appointment if the same was agreeable. Plaintiff accordingly wrote a note to the clerk of the school board accepting the same. Thereafter it transpired that plaintiff was called upon and served as supply teacher on two occasions during the four months for which compensation is claimed, being the first four months of said term, teaching altogether seven days—four days in October and three days in November.

The report of the committee, its adoption, the notice to

plaintiff, and her acceptance of said appointment, are claimed to constitute the contract to be interpreted in this action; and counsel concede that the decision of this case depends upon an interpretation of the employment, engagement, service, and compensation to be rendered by each party, as evidenced by these documents.

On the part of plaintiff and respondent here it is contended that the contract contemplated her engagement for the whole term at seventy dollars per month, whether she rendered any service in teaching or not. "That," she asserts in her testimony, "was what the contract called for"; that she was in readiness to teach when notified, during said four months, but did not claim compensation after the close of December, as she was sick in January and a considerable portion of the remainder of the year.

On the contrary, the defendant board of trustees (appellant here) contends that the contract contemplated that plaintiff was engaged as supply teacher to fill any vacancy which might occur by reason of sickness, or absence from other cause, of any teacher in the schools of said district. The district, in question, as we understand, includes the city of Missoula.

That a board of trustees of a school district has power, under the provisions of law governing its action, to bind the district, by contract, to pay supernumerary teacher or teachers a fixed salary while not rendering service as teacher, but merely waiting a contingency, which might or might not happen, to require some service, is extremely doubtful. According to the interpretation of this contract contended for by plaintiff, said trustees engaged to pay her seven hundred dollars for acting as supply teacher during said term, when her services might not be required at all, and, as actual experience showed, were only required seven days in four months of the term. This was the same compensation as was paid some of the teachers in said district for constant service, which fact plaintiff admits she knew. It might be proper enough to pay those who came at the eleventh hour, or came not at all, equally with those who "have borne the burden and heat of the day"; if the trustees, like the master of the vineyard, were dispensing of their own; but, in our view, the law governing them forbids

such munificence in their stewardship for the people of their district.

Aside from that view of the case, it seems hardly reasonable, in the light of the circumstances, that plaintiff should conclude, from her selection as "supply teacher" at the compensation stated, that she was elected to a sinecure, the principal duty of which, prospectively and practically, was to draw a salary equal in amount to that paid teachers for constant service. In adopting that conclusion, so far as the record shows, plaintiff made no inquiry as to the understanding or contemplation of the trustees. Indeed, the implication appears quite strongly, from what is shown that plaintiff and her advisers avoided raising that question, for, although plaintiff knew the teachers of said district were paid at the close of each school month, plaintiff made no application for the amount claimed. This was not made at all until May or June following the months for which the salary is now claimed.

Plaintiff's father, in testifying on her behalf, assumed to state the reason why plaintiff did not apply for her alleged salary at the close of the school months as they progressed, by saying that he had been trustee for thirty-five years, "and it was the custom for the clerk to pay the teachers without an application from them." If such was understood by plaintiff and her advisers to be the custom, it seems to us that the failure to receive payment would have aroused inquiry without such long delay; and it seems also that that very fact, if plaintiff was really counting upon such payment without service, would have tended, at least, to lead her to the conclusion that the officers of the district did not contemplate paying a regular salary for plaintiff's occasional service, or no service at all. The statute of this state contains a just rule of interpretation in this connection, in the provision that "when the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it." (Code Civ. Proc., § 636.) The clerk of said district, in his testimony on behalf of plaintiff, states that in December (one of the months for which she claimed salary) she again applied by letter for appointment as regular teacher in one of the

schools of said district, the salary for which was seventy dollars per month; that such application, with some others, was delivered by the clerk to the committee on teachers and salaries and was not returned to him; therefore, he was unable to produce it at the trial. Plaintiff disputed her witness in this particular, denying that she made that application. Nevertheless, the testimony of Mr. Musgrave, the clerk of the district, who was called by both parties, sounds very frank and disinterested. Indeed, if any leaning is discoverable at all, it is towards the plaintiff; and that circumstance is told with so much detail that it seems quite improbable he should be mistaken. However, that incident may only show that plaintiff was seeking more work, and not more compensation.

The court found the plaintiff, under said engagement, was entitled to compensation for the time served at the rate of seventy dollars per month. In our opinion, this was the proper interpretation. The case is therefore remanded, with directions to overrule plaintiff's motion for new trial. Costs may follow the judgment.

Reversed.

PEMBERTON, C. J., concurs.

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MONTANA MILLING COMPANY, APPELLANT. v. JEFFRIES, SHERIFF, RESPONDENT.

[Submitted July 17, 1893. Decided February 26, 1894.]

ATTACHMENT—*Book accounts—Duty of sheriff to garnish.*—It is the duty of a sheriff who has levied an attachment upon a stock of goods, and has in his possession thereunder the books of account of the defendant, to garnish those who appear therein as debtors, without first receiving a written notice from the plaintiff or his attorney, as provided for in section 188 of the Code of Civil Procedure, since sections 184, 185, and 186 require a sheriff, when a writ of attachment is placed in his hands, to attach and safely keep all the property of the defendant, including debts.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for damages against a sheriff for failure to execute a writ of attachment. Tried before HUNT, J., on agreed case. Defendant had judgment below. Reversed.

Edward C. Russel, for Appellant.

The main points to be decided are: Was a written *præcipe* to respondent necessary, in strict compliance with section 188 of the Code of Civil Procedure, to secure the service of garnishments under appellant's writ of attachment? If no such *præcipe* was necessary, was respondent negligent in not levying said garnishment under appellant's, or a prior, writ? If such a *præcipe* were necessary, was respondent justified in levying under the so-called *præcipes* under which he acted? Appellant contends that no such *præcipe* is necessary, but that the respondent was commanded to garnish debtors by the writ and statute; that section 188 is supplemental and additional to section 186, and not contradictory to, or exclusive of, the fifth paragraph of said section 186. Section 186 is a clear and express command to serve garnishments, with directions how to do it. Section 188 is simply a repetition of the mode of procedure, and a direction to pursue it in case of notice given by the plaintiff. It is not inconsistent with, or contradictory to, the command of section 186, but supplemental. The writ of attachment (the ordinary printed form) reads: "Now, we do therefore command you, the said sheriff or constable, that you attach and safely keep all the property of the said defendant within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand as above mentioned; unless," etc., and the statute, section 186, became a part of said writ, and made it include garnishments. The doctrine of "*Expressio unius est exclusio alterius*" applies only when its assistance is necessary to determine the intention of the legislature; or when that expressed is creative or in derogation of common law or other provisions of the statute. (Sutherland on Statutory Construction, § 325.) The maxim does not apply where the statute covers many cases, and some are mentioned without intention of excluding others. (Sutherland on Statutory Construction, § 329.) All statutes which can stand together relating to the same subject should be construed together and harmonized, if possible. (Sutherland on Statutory Construction, § 283; Sedgwick on Construction of Statutory Law, 209 et seq.) The legislature is presumed to

intend existing statutes, where they have not expressly abrogated them. Where no express repeal is needed none is deemed intended. (Sutherland on Statutory Construction, § 829.) The statutes of Missouri (§ 1264) provide for a general direction for garnishment and a special direction giving names of debtors, all in the writ of attachment, and this is practically the same as our statute (§§ 186-88.) This has been construed in *Pritchard* v. *Toole*, 53 Mo. 356, to intend that both directions shall be binding, and the officer shall exercise diligence in levying garnishments under the general direction, cited in 5 American and English Encyclopedia of Law, under garnishment, page 1121. Again, as attachment and garnishment are creatures of the statute, the service must be made in strict accordance with the statute, or the garnishee is not held; he pays at his peril; the rights of third parties are not barred, and the garnishee is again liable. (Drake on Attachment, § 451 *b*; *Haley* v. *Hannibal etc. R. R. Co.*, 80 Mo. 112; *Fletcher* v. *Wear*, 81 Mo. 524; *Gates* v. *Tusten*, 89 Mo. 13; *Connor* v. *Pope*, 18 Mo. App. 86; *Pratt* v. *Sanborn*, 63 N. H. 115.) The sheriff must execute the process diligently, and must answer to plaintiff in damages for negligence. (Crocker on Sheriffs, §§ 280, 287, 851, 852.) The sheriff is bound to make reasonable inquiry and search for property of defendant. (Crocker on Sheriffs, §§ 432, 851; Drake on Attachment, §§ 188, 190, 191, 191 *a*; *Fisher* v. *Gordon*, 8 Mo. 386; *Taylor* v. *Wimer*, 30 Mo. 126; *Bell* v. *Commonwealth*, 1 J. J. Marsh. 551.) The plaintiff is under no obligation to give the officer information. (Freeman on Executions, §§ 107, 252, and cases cited; Crocker on Sheriffs, § 851; *Hargrave* v. *Penrod*, Breese, 401; 12 Am. Dec. 203, and note; *Batte* v. *Chandler*, 53 Tex. 613.)

Leslie & Craven, for Respondent.

Respondent insists that sections 186 and 188 of the Compiled Statutes are to be construed together, and as one continued series of instructions to the sheriff, without regard to section 187, which gives instructions to the recorder. There is nothing in either section but prescribed duties and directions to the

sheriff as to what he shall do with the writ of attachment, and how and when he shall do it, in the various circumstances of each case. The construction of section 186, which is claimed by counsel for appellant, necessarily includes and embodies every particle of power, authority, and duty imposed and conferred upon the sheriff by section 188. And if such power and duty come to him by virtue of section 186, why and for what reason was section 188 enacted and set forth in the same chapter, in connection with the same subject matter, and in the same act of the legislature? But is the conclusion that the section is only a repetition tenable when tested by the principles of statutory construction? Sections 186 and 188 of the Compiled Statutes, with the exception of changes in the former in respect to the manner of attaching real estate, are sections 96 and 97 intact, passed at Bannock in 1864. Section 187, prescribing duties to the recorder, was afterwards enacted. And to arrive at the conclusion of the appellant in this cause we are asked to believe that the legislature in its first session adopted section 188 as a vain and cumbersome repetition, and has since carried it along through all the successive revisions, from that time to this, as so much worthless luggage. How much more consonant with every principle of statutory construction to conclude that subdivision 5 of section 186 specifies how debts, credits, and other personal property not capable of manual delivery may be attached, and that section 188 directs the sheriff when and under what information the duty is imposed upon him, to prepare and serve garnishments. Every clause and word of a statute is presumed to have been intended to have some force and effect. *A fortiori* the language of a statute is to be given such a construction as will give the act some force and effect. It is a cardinal principle that all statutes are to be so construed as to sustain, rather than to ignore, them; to give them operation if the language will permit, instead of treating them as meaningless. (Endlich on Interpretation of Statutes, §§ 265, and cases cited, 399.) A statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage or treating it as a repetition of a provision already made. (*Gates* v. *Salmon*, 35 Cal. 576; 95

Am. Dec. 139.) There are abundant reasons in support of the justice of the theory that a sheriff need not garnish without special instructions from plaintiff. Real and personal property usually afford some idea to the officer of their value.

The officer knows before he levies whether any thing can be realized from the property about to be taken. But in the case of debts it is different. How can an officer know from the fact that books of accounts show various amounts to be due from a hundred or more debtors of a failing firm, that garnishment of them all would result in sufficient money to even pay his costs? Is he expected to accept the books as conclusive, and act upon the presumption that all debtors are good, and that there are no offsets, payments, or counterclaims? Or is he to constitute himself a spy to find out all of these uncertainties, and then garnish if the coast is clear?

If the sheriff must make search and find out whom to garnish under the general mandate of the writ alone, as contended by plaintiff, how and why is it that he may act upon oral information received from third parties, while the information from plaintiff or his attorney must be in writing? A strange construction surely that would compel the sheriff at his peril to inquire from, and act upon, the oral statement of A, B, and C, strangers to the suit, while the information from plaintiff or his attorney, in order to afford a basis for like action on the part of the sheriff, must be in writing. The cases cited by appellant showing the necessity of due diligence, do not apply to statutes like ours. The Missouri statute, as to writs of attachment, was not involved in the case of *Pritchard* v. *Toole*, 53 Mo. 356, cited by appellant. The presumption of law is that the sheriff did his duty in this case. Neglect of duty free from contributory negligence on the part of the plaintiff must appear, before the officer can be made liable.

The books were in the store, and with all the contents were taken into possession by the sheriff. It does not appear as to whether he actually knew they were a part of the contents of the store, not being properly the subject of attachment, except for their actual value as so much bound paper, until his attention was called to them by subsequent creditors in their *præcipes*. As to whether they were properly kept and posted,

so that he could have known their contents without extraordinary research does not appear. There is nothing in the agreed statement to show that the sheriff had any reason to know or believe there was any debt owing to the defendants.

McConnell, Clayberg & Gunn, also for Respondent.

PEMBERTON, C. J.—This is an action for damages, brought against the defendant for neglect and failure to execute a writ of attachment in his hands as sheriff of Lewis and Clarke county. The case was tried in the court below on an agreed statement of facts, which is as follows:

"1. That the Montana Milling Company was, at all the times hereinafter mentioned, and now is, a corporation organized under the laws of the state of Montana, doing business at Helena, in said county of Lewis and Clarke; that Charles M. Jeffries was, at all times hereinafter mentioned, and now is, the sheriff of said county of Lewis and Clarke.

"2. That on the fifteenth day of September, 1890, the Montana Milling Company commenced an action against Kuphal & Schumacher, and a writ of attachment was issued in said action, and placed in the hands of Charles M. Jeffries, sheriff, on the same day, and judgment against said defendants in favor of said plaintiff was thereafter rendered.

"3. Six other writs of attachment, in as many suits against the same defendants, were in the hands of said sheriff when he received that of the Montana Milling Company, and six or more writs, in as many more suits against the same defendants, were placed in the hands of said sheriff after that of the Montana Milling Company.

"4. In pursuance of the first and subsequent writs, including that of the Montana Milling Company, the store of defendants Kuphal & Schumacher, together with stock of goods and fixtures therein, was attached by said sheriff on said fifteenth day of September, 1890.

"5. The books of account of said defendants Kuphal & Schumacher were in the said store at the time of said levy, were taken possession of by said sheriff, no one having made a demand for them, but were never attached by said sheriff.

"6. No written *præcipe* or notice, as contemplated by section

188 of the Revised Statutes of Montana, for garnishing debtors of said defendants Kuphal & Schumacher, was given to said sheriff by the said Montana Milling Company, nor has any ever been given. Though the said Montana Milling Company did, at the time of bringing said suit, have reason to believe that certain parties were indebted to said Kuphal & Schumacher, yet it failed to give said sheriff a written notice containing the names of said parties so indebted and the amounts of said indebtedness.

"7. Said sheriff attached no moneys due said Kuphal & Schumacher by garnishment until the twenty-ninth day of September, 1890, and then, under writs of attachment issued in the suits, respectively, of *Geo. R. Newell & Co.* v. *Kuphal & Schumacher*, placed in his hands September 24, 1890, and *Franklin McVeagh & Co.* v. *Kuphal & Schumacher*, placed in his hands on the seventeenth day of September, 1890, a written *præcipe* for such garnishment having been filed with said sheriff in the case of Franklin McVeagh & Co., on or about the twenty-ninth day of September, 1890, and in the case of Geo. R. Newell & Co. on the first day of October, 1890. Copies of said *præcipes* are hereto attached, marked, respectively, 'Exhibit A' and 'Exhibit B,' and made a part hereof.

"8. That under the last-mentioned writs the sheriff collected the sum of nine hundred and fifty-nine dollars and twenty-seven cents, which he paid to said plaintiffs Geo. R. Newell & Co. and Franklin McVeagh & Co., under their writs of attachment, which were subsequent to that of the Montana Milling Company, which said sum was collected from debtors of said Kuphal & Schumacher, who appeared to be such debtors by the said books of account of said Kuphal & Schumacher in the hands of said sheriff as aforesaid.

"9. That, if said sum collected under said garnishments, and paid over to said subsequent attaching creditors, had been paid by said sheriff to the attaching creditors in the order of their priority, the said judgment of the Montana Milling Company would have been paid in full.

"10. That the said judgment of the Montana Milling Company is still unsatisfied, and there is no property in the sheriff's

hands, or under his control, of said Kuphal & Schumacher, to satisfy it."

The points of contention submitted to the court below were as follows: "The Montana Milling Company claims that Charles M. Jeffries, as sheriff, is liable to it for the amount of its said judgment against said Kuphal & Schumacher, by reason of his negligence in not levying, under its said writ of attachment, on the said credits of said Kuphal & Schumacher. Charles M. Jeffries, sheriff, claims that he is not so liable, for the reason that he was under no obligation to said Montana Milling Company to levy upon such credits under said writ, not having received any written *præcipe* or information in writing from said plaintiff or its attorney, as contemplated in section 188 of the Revised Statutes of Montana, page 74; that if there was any negligence it was on the part of said Montana Milling Company, and not said sheriff."

Upon this statement of facts, and these points of contention, the court rendered judgment in favor of the defendant. From this judgment this appeal is prosecuted.

From the contention of the parties, as shown above, it will readily be seen that the appellant contends that it was the duty of the respondent, as sheriff, to attach the debts owing to Kuphal & Schumacher, as shown by the books of account of that firm, taken possession of by him under the writs of attachment against said firm, without any written notice, while the respondent contends that he was not required to attach such debts, or garnish the debtors of said firm, without a written notice so to do.

The law of this state requires a sheriff, when a writ of attachment is placed in his hands, without delay to attach and safely keep all the property of the defendant, including debts, named in the writ, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand. (Code Civ. Proc., §§ 184–86.) Subdivision 5 of said section 186 prescribes the manner of attaching debts and credits in the hands of persons owing such debts, or having in their possession such credits. Appellant contends that under these provisions of the statute it was the duty of the sheriff to attach the debts due the said firm of Kuphal & Schumacher in the

hands of the persons owing them, as shown by the books of account of said firm in the possession of the sheriff under the writ of attachment issued against said firm without written notice. The respondent contends that section 188 of the Code of Civil Procedure, which is as follows: "Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ"—controls and is decisive in this case. In other words, the respondent contends that a written notice under said section 188 was a *sine qua non* to the fixing of the liability of the sheriff for failing to garnish the debtors of said firm of Kuphal & Schumacher. Why was it necessary to give the respondent notice in writing to garnish any of the debtors of said firm? He had possession of the books of account of said firm under the writs of attachment in his hands. He had all the information necessary as to who were the debtors of said firm. The books of account of the attached firm gave him that information. It was his duty, under the law, to attach, without delay, all the property of the defendants in his county not exempt from execution, or so much thereof as would be sufficient to pay the demand of the plaintiff. The debts of the firm were as much property, and as much subject to attachment, as any other character of property. Then, why was it not as much his duty to attach the debts in the hands of the persons owing them, in the manner prescribed by law? If he failed to use due diligence in attaching property, or did not attach sufficient to satisfy the demand of plaintiff, he rendered himself liable to plaintiff for damages. (Drake on Attachment, §§ 188, 190, 191 *a*.) Nor was the plaintiff required to notify him in writing, or otherwise, as to whom he should garnish, or what property to attach. It was the duty of respondent to make reasonable effort to find sufficient property and effects of the defendant to satisfy the demands of the plaintiff. This he did not do. He could as well have garnished the debtors of said firm, under the writ

issued in the suit of plaintiff, without written notice, as he did under subsequent writs with written notice; for the written notice, in the subsequent attachments, to garnish debts, reads as follows:

"Geo. R. Newell & Co. v. Kuphal & Schumacher: To the sheriff: We understand that you have a list in your possession of the creditors of the above-named defendants. Since the plaintiffs in the above-named cause are probably the last on the list in the general attachment on the goods, will you please garnish a sufficient number of those indebted to the defendants who have not been garnished, in order to have enough secured by the writ to secure our demand." This notice did not designate any particular debtor or debtors. It simply called the sheriff's attention to the list of debtors of said firm contained in the books of account, and asked that they be garnished. This was merely calling his attention to information he already had, and to property which it was his duty to have attached under former writs. We do not think the plaintiff was required, under said section 188, to give the respondent written notice to garnish the debtors of the defendant firm, under the facts and circumstances of this case, or that such written notice was a prerequisite to the liability of the respondent. (See *Hargrave* v. *Penrod*. Breese, 401; 12 Am. Dec. 201, and authorities cited in note; Crocker on Sheriffs, § 851.) It was the duty of the sheriff to have attached the debts due said firm, as shown by the books of account of said firm in his possession, and to have paid out the proceeds or amounts so collected in the order of the priority of the writs of attachment in his hands; or, having garnished said debtors, and collected the amount owing said firm, if he had any doubt as to how he should proceed in paying out the same, he should have brought the money into court, and asked for an order as to the disposition thereof. In this manner he could have protected himself as well as this appellant.

The judgment of the court below is therefore reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiff.

Reversed.

HARWOOD, J., concurs.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1894.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT, }

IN RE RICKER'S ESTATE.

[Submitted March 7, 1893. Decided March 12, 1894.]

EXECUTORS—*Resulting trust.*—The doctrine of equity that a trustee shall not be permitted to make any profit by the use of trust funds does not warrant the creation of a resulting trust in favor of an heir, in lands which an executor has purchased, using trust funds to the extent of one-half the purchase price, where, punctually and as directed by the will, he accounted for the funds so used with compound interest.

SAME—*Commissions.*—Where the administration of an estate continues over a period of years, an executor may properly charge the estate at the close of each year, with the commission allowed by law on funds of the estate, actually disbursed during the preceding year. (*In re Dewar's Estate*, 10 Mont. 426, distinguished.)

SAME—*Compromise of claims.*—Where an executor has compromised a claim due the estate after collecting some payments from time to time from the debtors, who were generally regarded as insolvent, he should not be charged with the amount rebated from the debt upon the mere showing that for several years during the running of the debt title to certain land stood in the name of one of the debtors, and which property was conveyed for a consideration, as stated in the deed, much larger than the amount of his indebtedness to the estate, it

not appearing that such property was subject to execution, or that the consideration in the deed represented the value.

SAME—*Use of trust funds—Interest.*—An executor who has retained in his hands funds of the estate which should have been deposited in bank at interest, should not be required, in an equitable accounting, to pay arbitrary rates of interest upon such funds in excess of the statutory rate, particularly where he accounted for a higher rate than the banks, wherein the money was ordered deposited, would have paid.

SAME—*Commission—Review on appeal.*—An objection that an executor was allowed a higher rate of commission in certain years than the statute allowed, cannot be raised for the first time on appea'

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for an accounting against an executor. The cause was tried before BUCK, J., who rendered a decree for petitioners. Reversed.

Massena Bullard and *D. S. Wade*, for the Executor, Appellant.

I. We admit at the outset that an executor or trustee must make no profit or gain to himself of any kind, upon or out of the funds in his hands as such executor or trustee. It is so declared in our statute, and the statute but expresses in definite words the effect of numerous decisions. Courts have sometimes enforced this rule and principle with such rigor, and at other times with such laxity, that Chancellor Sanford, in the case of *Clarkson* v. *De Peyster*, 1 Hopk. Ch. 505, in defining the duties and liabilities of trustees, applied the rule as follows: "A jealous severity, which would deter prudent men from accepting these trusts, and a lax indulgence which would invite men to accept them for gain, are extremes which are equally inexpedient."

II. The failure to invest in government securities was not malversation or breach of trust. The court had the inherent authority and power to make the order concerning the investment of these funds, when it became necessary so to do for the protection or preservation of the funds and the interests of the legatees, or if it became impossible or impracticable to carry out the provisions of the will concerning investments. (Crosswell on Executors and Administrators, § 439; Schouler on Executors and Administrators, § 335; *Twaddell's Appeal*, 5 Pa. St. 17; *Lansing* v. *Lansing*, 45 Barb. 182; *Gray* v. *Lynch*,

8 Gill, 405.) In cases of unauthorized varying of the securities, the trustee takes upon himself the burden of proving entire *bona fides*, and that there was reasonable ground to believe that the fund would be benefited; and if this can be shown, the courts will sustain his action. (*Washington* v. *Emery*, 4 Jones Eq. 32; *Cornwise* v. *Bourgum*, 2 Ga. Dec. 15.) The directions of the will are not to be followed, if the funds of the estate would be lost or injured thereby. It would have been waste, and a squandering of the funds of the estate, to have invested its funds as directed by the will. For all practical purposes government bonds could not have been obtained. They were from 17 to 20 per cent premium, bearing but 5 per cent interest, which was soon after reduced to 4 per cent interest, and to have purchased them would have required the payment from the estate funds of from $2,500 to $3,000 in premiums, which sum would have been entirely lost to the estate, and when the bonds were obtained it would have required three and one-half years' interest thereon to have paid this premium. This order of the court, as to investing the funds, relieved the estate from the payment of a burdensome premium, and has enabled the executor to add to the value of the estate about $16,000 in interest received and accounted for by him. But suppose there had been a breach of trust in not following the will as to investments, what are the consequences? The executor only becomes personally liable for losses if the investment he made did not equal the investments directed by the will. (See Schouler on Executors and Administrators, § 329, and note.) In such a case the standard or measure of loss would be what would have been made or realized by the estate or legatees if the directions of the will had been followed. The court will inquire and ascertain the amount due if the will had been followed. (1 Perry on Trusts, § 472.) If the executor accounts for more than he would have realized by following the will, and has made no profit for himself, the legatees cannot complain. They have no cause of complaint if they have not been injured, and the executor has not been benefited. The case is analogous to that of a statute requiring trustees to invest in certain securities, but they fail to do so, and invest in others not named in the statute, in which cases

the trustees are only required to make good the losses in consequence of departing from the statute. (See 1 Perry on Trusts, 553, and note; Schouler on Executors and Administrators, § 336.) And so trustees may elect to invest in securities not named in a statute, and if they so elect they only become responsible for losses. The rule is fully stated by Lord Cottenham and quoted in Schouler on Executors and Administrators, section 336. Even in such cases, if the trustee acts in good faith, and exercises good judgment, and there is a loss, he will be protected. (See *Twaddell's Appeal*, 5 Pa. St. 18.) Undoubtedly, the same rule would be applied to a will directing certain investments, and especially in a case where, by departing from the will, the estate and legatees had been greatly benefited. (See *Smith* v. *Wellington etc. Co.*, 83 Ill. 498; *Richardson* v. *Knight*, 69 Me. 285.)

III. The trial court directs that the executor be charged with compound interest upon the funds in his hands at the rate of 18 per cent per annum from July 21, 1875, to August 31, 1880; from August 31, 1880, to January 20, 1885, with compound interest at the rate of 15 per cent per annum; and from January 20, 1885, to the date of the exhibit filed herein, at the rate of 12 per cent compound interest per annum. Having found that the executor mingled the trust funds with his own, from the fact that all of the trust funds were not at all times deposited in the banks, then follows the order as to the rates of interest to be charged, which order is based upon the testimony of certain bank officers, who testified that money might have been loaned, not indeed at compound, but at simple interest, at the rates and between the dates above mentioned. There is no testimony in the case tending to show at what rates money might have been loaned between those dates at compound interest for a series of years. But the injustice of charging an executor with compound interest at these rates for a long series of years will be realized when it is remembered that in loaning money for a long number of years, with the utmost vigilance and care, there are always losses, and always times of depression and stagnation when money cannot be loaned at all. (*King* v. *Talbot*, 40 N. Y. 95.) Even in old and well-established communities there are periods of

depression and stagnation which prevent or make unsafe the loaning of money. For these reasons courts hold that it would be unjust and a hardship to charge an executor or trustee with the full legal rate of simple interest on funds in his hands for a series of years. To charge compound interest against a trustee for a long series of years, upon the supposition that he has received, or that it would be possible for him to have received, such interest, is against the common experience of the business world. Interest is not charged against a trustee under such circumstances to take from him what he has not received. Compound interest will not be charged or allowed as a penalty, or to punish the executor or trustee. It is only resorted to as a means to compel the trustee to refund the interest he has actually received, or that he is presumed actually to have received. (See *Utica Ins. Co.* v. *Lynch*, 11 Paige, 524; *Hood's Estate*, 1 Tuck. 396; *Prescott's Estate*, 1 Tuck. 430; *Spear* v. *Tinkham*, 2 Barb. Ch. 213; *Manning* v. *Manning*, 1 Johns. Ch. 527; *McKnight* v. *Walsh*, 24 N. J. Eq. 498; *English* v. *Harvey*, 2 Rawle, 305; *In re Harland's Accounts*, 5 Rawle, 329; *Light's Appeal*, 24 Pa. St. 181; *McCall's Estate*, 1 Ashm. 357; *Barney* v. *Saunders*, 16 How. 535; *Williams* v. *Petticrew*, 62 Mo. 460; *Scott* v. *Crews*, 72 Mo. 261; *Boynton* v. *Dyer*, 18 Pick. 1; *De Peyster* v. *Clarkson*, 2 Wend. 77; *Ackerman* v. *Emott*, 4 Barb. 626; *Garniss* v. *Gardiner*, 1 Edw. Ch. 128; *Lansing* v. *Lansing*, 45 Barb. 182; *Fay* v. *Howe*, 1 Pick. 527, and note; *Clemens* v. *Caldwell*, 7 B. Mon. 171; *Luken's Appeal*, 7 Watts & S. 48; *Fall* v. *Simmons*, 6 Ga. 272; *Cartledge* v. *Culiff*, 21 Ga. 1; 1 Perry on Trusts, § 471; *Hughes* v. *People*, 111 Ill. 457; *Wilmerding* v. *McKesson*, 103 N. Y. 329; *Graver's Appeal*, 50 Pa. St. 189.) Again, by what theory or principle is the executor required to pay interest from the very day of his appointment, when he is compelled to hold the funds of the estate in his possession for the purpose of paying the debts until a year from that date? In 1 Perry on Trusts, fourth edition, section 462, it is said: "A year is a reasonable time within which an executor may call in a testator's estate and pay off his liabilities, and it is necessary during that time that the executor should keep the money on hand. As a general rule executors and administrators are not

chargeable with interest for one year after they have taken out letters (that time being allowed them to get in the estate and settle their accounts), unless they have actually received it, or have used the money during that time." (*Fox* v. *Wilcocks*, 1 Binn. 194; 2 Am. Dec. 433; *Verner's Estate*, 6 Watts, 250; *Findlay* v. *Smith*, 7 Serg. & R. 264; *Bitzer* v. *Hahn*, 14 Serg. & R. 232; *Commonwealth* v. *Mateer*, 16 Serg. & R. 416; *Walthour* v. *Walthour*, 2 Grant Cas. 102; Levin on Trusts, 279; *Ogilvie* v. *Ogilvie*, 1 Bradf. 356; *Jacot* v. *Emmett*, 11 Paige, 145.) After the expiration of one year interest begins to run on the balance found in their hands on the annual accounting (*McCall's Estate*, 1 Ashm. 357; *Boynton* v. *Dyer*, 18 Pick. 2; *Gilman* v. *Gilman*, 2 Lans. 1.) "Where sums have been received after that time the court will allow six months from the time of the receipt before the charge of interest is to commence." (*Worrell's Appeal*, 23 Pa. St. 44; *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 511; 7 Am. Dec. 504; *McKnight* v. *Walsh*, 24 N. J. Eq. 498; *Voorhees* v. *Stoothoff*, 11 N. J. L. 155; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; see 7 Am. & Eng. Ency. of Law, 427, and notes.)

IV. The foregoing considerations are of weight in fixing the rate of interest with which this executor should be charged. There is no testimony in the case showing, or tending to show, that the executor mingled the funds of the estate with his own funds, or that he used the funds of the estate in his private business, except the fact that his annual reports or accounts, taken in connection with the bank statement of money on deposit in the name of the executor, show that all the funds of the estate were not kept on deposit by the executor in the banks. The complaint is not that the executor has not accounted for these sums of money assumed by him, together with interest thereon, or that he has not accounted for the balances in his hands from year to year, or that he has not accounted for every dollar that ever came into his hands belonging to the estate, together with interest thereon. All this is admitted, but the claim is that he has not accounted for all the interest with which he is legally chargeable.

V. The testimony does not support the finding of the court that the executor mingled the funds of the estate with

his own, and used them in his private business. It is shown that the balances not deposited in the banks were the debts of insolvent debtors assumed by the executor and the amounts required to be kept on hand for the widow. But if the finding of the court were true, and supported by the evidence, is the conclusion of the court thereon that the executor should be charged with compound interest at the rate of 18, 15, and 12 per cent per annum authorized or justified by the law? Mr. Perry, in his work on Trusts, which is cited as authority by the highest courts of the country, in volume 1, fourth edition, section 468, answers the question as follows: "If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, ... he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements." This is exactly what the court found that this executor did. "That the said William A. Chessman mixed large sums of money belonging to the said estate with his private funds, and used the same on his own account," and for doing which the court charges him, not with simple interest at the statutory rate, in the absence of special agreements, but with compound interest at illegal rates, except for special agreements. Our statutory rate, in the absence of special agreement, is simple interest at the rate of 10 per cent per annum, and there is no statute, and never has been in our territory or state, authorizing compound interest at any rate whatever, either in favor of a dead or live man. (*King* v. *Talbot*, 40 N. Y. 86; *Nelson* v. *Hagerstown Bank*, 27 Md. 53; *Duffy* v. *Duncan*, 35 N. Y. 187; *Young* v. *Brush*, 38 Barb. 294; *Owen* v. *Peebles*, 42 Ala. 338; *Wistar's Appeal*, 54 Pa. St. 60; *Newton* v. *Bennett*, 1 Brown Ch. 359; *Littlehales* v. *Gascoyne*, 3 Brown Ch. 73; *Mousley* v. *Carr*, 4 Beav. 49; *Mumford* v. *Murray*, 6 Johns. Ch. 1; *Jacot* v. *Emmett*, 11 Paige, 142; *Kellett* v. *Rathbun*, 4 Paige, 102; *De Peyster* v. *Clarkson*, 2 Wend. 77; *Garniss* v. *Gardiner*, 1 Edw. Ch. 128; *Spear* v. *Tinkham*, 2 Barb. Ch. 211; *Manning* v. *Manning*, 1 Johns. Ch. 527; *Brown* v. *Ricketts*, 4 Johns. Ch. 303; *Williamson* v. *Williamson*, 6 Paige, 298; *Dunscomb* v. *Dunscomb*, 1 Johns.

Ch. 508; 7 Am. Dec. 504; *Minuse* v. *Cox*, 5 Johns. Ch. 448; 9 Am. Dec. 313; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; *Gray* v. *Thompson*, 1 Johns. Ch. 82; *Armstrong* v. *Miller*, 6 Ohio, 118; *Aston's Estate*, 5 Whart. 228; *Worrell's Appeal*, 23 Pa. St. 44; *Graver's Appeal*, 50 Pa. St. 189; *Hess' Estate*, 68 Pa. St. 454; *Peyton* v. *Smith*, 2 Dev. & B. Eq. 325; *Jameson* v. *Shelby*, 2 Humph. 198; *Dyott's Estate*, 2 Watts & S. 565; *Kerr* v. *Laird*, 27 Miss. 544; *Lomax* v. *Pendleton*, 3 Call, 538; *Handly* v. *Snodgrass*, 9 Leigh, 484; *Carter* v. *Cutting*, 5 Munf. 223; *Wood* v. *Garnett*, 6 Leigh, 271; *Griswold* v. *Chandler*, 5 N. H. 497; *Lund* v. *Lund*, 41 N. H. 355; *Turney* v. *Williams*, 7 Yerg. 172; *Wright* v. *Wright*, 2 McCord Eq. 185; *Knowlton* v. *Bradley*, 17 N. H. 458; 43 Am. Dec. 609; *McKim* v. *Hibbard*, 142 Mass. 422; *In re Myers*, 131 N. Y. 409. To the same effect are numerous authorities cited in 7 Am. & Eng. Ency. of Law, 426, note 3.) This rule is subject to the qualification that the trustee shall make no profit out of the trust fund. But there is no proof that this executor made any profit whatever out of the trust fund, or that he ever used the same to his own gain or advantage in any manner. And it has been heretofore pointed out that for this long series of years, and in this country, the executor could not have loaned this considerable sum of money, and received any greater amount of interest than he has accounted for. The principle of computation and the manner of charging a trustee with interest, where he has mingled the trust fund with his own, as announced in the De Peyster case, runs all through the decisions, in cases where there is no fraud or willful breach of trust, the principle being to avoid charging interest as a penalty, and to arrive at the exact amount of interest the trustee has received or that he is presumed to have received. In 1 Perry on Trusts, section 468, the principle is stated in this way: "The proper mode of taking the account of trustees is to treat all the income of the trust received during the current year as unproductive; and to charge against the income of the current year all the disbursements, including the compensation or commissions of the trustee for the same year, and to strike a balance, upon which, as a general rule, interest is to be allowed, but in such a way as not to compound it," citing the following

authorities in support of the proposition: *Boynton* v. *Dyer*, 18 Pick. 1; *Pettus* v. *Clawson*, 4 Rich. Eq. 92; *Jones* v. *Morrall*, 2 Sim., N. S., 241; *De Peyster* v. *Clarkson*, 2 Wend. 77; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 288; 21 Am. Dec. 86; *Luken's Appeal*, 47 Pa. St. 356; *Reynolds* v. *Walker*, 29 Miss. 250; *Roach* v. *Jelks*, 40 Miss. 754; *Crump* v. *Gerock*, 40 Miss. 765; *Rowland* v. *Best*, 2 McCord Eq. 317; *Jordan* v. *Hunt*, 2 Hill Eq. 145; *Walker* v. *Bynum*, 4 Desaus. Eq. 555; *Powell* v. *Powell*, 10 Ala. 900; *Sheppard* v. *Starke*, 3 Munf. 29; *Burwell* v. *Anderson*, 3 Leigh, 348; *Garrett* v. *Carr*, 3 Leigh, 407; *Campbell* v. *Williams*, 3 T. B. Mon. 122; *Jones* v. *Ward*, 10 Yerg. 160; *Elliott* v. *Sparrell*, 114 Mass. 404. See, also, 7 Am. & Eng. Ency. of Law, 429; *Callaghan* v. *Hall*, 1 Serg. & R. 241.

VI. As to the land found by the court to have been purchased by the executor in his own name with funds of the estate, we contend that there is no testimony whatever to support, authorize, or justify the finding. It has not even a presumption in its favor. It has nothing more than a vague, shadowy suspicion or conjecture upon which to rest. The private property of an executor or trustee cannot be taken away from him by vague suspicions or conjectures. Land cannot be impressed with a trust upon lame, unwarranted, or inconclusive presumptions. (1 Perry on Trusts, § 137.) In *Philpot* v. *Penn*, 91 Mo. 43, the court says: "It has been repeatedly held by this court that the *onus* of establishing a resulting trust rests upon him who seeks its enforcement, and where it is sought to establish such a trust by parol evidence, it must, to warrant a decree, be so clear, definite, and certain as to leave no reasonable ground for doubt." The same certainty, your honors will observe, as is required to convict of crime. To the same effect are the following authorities: *Railsback* v. *Williamson*, 88 Ill. 497; *Shepard* v. *Pratt*, 32 Iowa, 296; *Childs* v. *Griswold*, 19 Iowa, 362; *Stall* v. *Cincinnati*, 16 Ohio St. 169; *Parmlee* v. *Sloan*, 37 Ind. 469; *Cutler* v. *Tuttle*, 19 N. J. Eq. 560; *White* v. *Sheldon*, 4 Nev. 280; *Nelson* v. *Worrall*, 20 Iowa, 469; *Cuming* v. *Robins*, 39 N. J. Eq. 46; *Clarke* v. *Quackenbos*, 27 Ill. 260; *Baker* v. *Vining*, 30 Me. 128; 50 Am. Dec. 617; *Carey* v. *Callan*, 6 B. Mon. 44; *Hyden*

v. *Hyden*, 6 Baxt. 406; *Harvey* v. *Pennypacker*, 4 Del. Ch. 445; *Witts* v. *Horney*, 59 Md. 584; *Parker* v. *Snyder*, 31 N. J. Eq. 164; *Brickell* v. *Earley*, 115 Pa. St. 473; *Malin* v. *Malin*, 1 Wend. 626; *Snelling* v. *Utterback*, 1 Bibb. 609; 4 Am. Dec. 661; *Green* v. *Dietrich*, 114 Ill. 636; *Thomas* v. *Standiford*, 49 Md. 181; *Johnson* v. *Richardson*, 44 Ark. 365; *Enos* v. *Hunter*, 9 Ill. 211. Even if it had been proved on the trial by such testimony as the law requires, that this land was partly paid for with the trust fund, and partly with the funds of Chessman, the legatees would not then be entitled to the land they claim. The most that the law would give to them or the estate in such case would be a lien upon the land for the moneys of the estate or trust fund used in its purchase or interest thereon. (2 Perry on Trusts, § 842; *Hedrick* v. *Tuckwiller*, 20 W. Va. 489.)

VII. The court below held that an executor was not entitled to any compensation for his services until there had been a final settlement of his accounts. Under our statutes an executor or administrator, in ordinary cases, must settle the estate and render his final account in one year from the date of his appointment. In such cases it may be that no compensation is earned until the final account is rendered. But in a case where an executor is also trustee for the legatees, and is required to hold and to invest trust funds for a long series of years, on interest, and where no final account can be rendered until such period has elapsed, a very different rule as to compensation should be applied. In *Baker* v. *Johnston*, 39 N. J. Eq. 493, it is held that executors are entitled to commissions as executors, and also as trustees, when, their duties as executors having ended, they take the estate as trustees, and afterwards act solely in that capacity. (See to the same effect *Pitney* v. *Everson*, 42 N. J. Eq. 361; *Blake* v. *Blake*, 30 Hun, 469.) Besides his commissions as executor he was entitled to a reasonable compensation for his services as trustee, though he has made no charge for such services. It is no trifling matter to have the care and responsibility of keeping a large sum of money invested on interest for a long period of years, and the authorities on the subject are to the effect that a trustee is entitled to reasonable compensation for such services.

VIII. The testimony shows that, as to the claims against certain parties, the executor compromised and settled with said debtors to the estate and received considerably more on each of said claims than the appraised value thereof but less than the amount due thereon. Our statute provides (Probate Practice Act, § 232, p. 332) that an executor or administrator may compound or compromise with a debtor who is unable to pay his debts, with the approval of the probate court or judge. The executor made the compromises above referred to, without first having obtained the approbation of the probate court or judge, and therefore, as we understand him, the petitioner contends that the executor should be charged with the full amount of principal and interest due on these compromised claims. It would shock the universal sense of justice to charge the executor with the worthless or uncollectible claims belonging to a testator at the time of his death. No court could be found that would charge an executor with the principal or interest due upon such claims, and it was entirely unnecessary for one legislative assembly to have enacted, as it did in section 250 of the Probate Practice Act, that "no executor or administrator is accountable for any debts due the decedent, if it appears that they remain uncollected without his fault." (See Smith's Probate Practice, 228.) Independent of any statute, executors and administrators have full authority to compromise claims, and are not liable for any damage resulting to the estate except for an injudicious use of the power. If they act with fidelity and prudence their compromises are sustained, and they are protected. (*Bacon* v. *Crandon*, 15 Pick. 79; *Nelson* v. *Cornwell*, 11 Gratt. 724; *Potter* v. *Cummings*, 18 Me. 55; *Boyd* v. *Oglesby*, 23 Gratt. 674; *Alexander* v. *Kelso*, 12 Heisk. 311; *Wilks* v. *Slaughter*, 49 Ark. 235; *Berry* v. *Parkes*, 3 Smedes & M. 625; *Chadbourn* v. *Chadbourn*, 9 Allen, 173; *Chase* v. *Bradley*, 26 Me. 531; *Wyman's Appeal*, 13 N. H. 18; *Pusey* v. *Clemson*, 9 Serg. & R. 204; *Woolfork* v. *Sullivan*, 23 Ala. 548; 58 Am. Dec. 305; *Coffin* v. *Cottle*, 4 Pick. 454; *Bean* v. *Farnam*, 6 Pick. 269; *Patten's case*, 1 Tuck. 56.) Our statute which authorizes executors and administrators to compromise claims with the approbation of the probate court does not take away the common-law right which existed prior to the

passage of the statute. (7 Am. & Eng. Ency. of Law, 286, and cases cited.) The executor had the right to compromise without obtaining leave of court, and there is no liability upon him for so doing if he shows that the compromises were for the best interests of the estate. (See Schouler on Executors and Administrators, § 298, pp. 386, 387; *Wood* v. *Tunnicliff*, 74 N. Y. 38; *Geigers* v. *Kaigler*, 9 S. C. 401.)

B. P. Carpenter, and *Alexander C. Botkin*, for the Petitioner, Respondent.

I. The contention that when land is partly paid for from the trust fund, and partly from the individual money of the trustee, the beneficiaries cannot impress a trust upon the property, but only a lien for the moneys of the estate used in the purchase, cannot be supported when the amount of the trust fund so employed is an aliquot part of the entire purchase price. In this case the court finds that the executor used $5,000 of the estate's funds in buying the tract of land from Child and Young, which was just one-half of the entire sum paid. Chancellor Kent says (4 Kent's Commentaries, 306): "If only part of the purchase money be paid by the third party there will be a resulting trust in his favor *pro tanto;* and the doctrine applies to a joint purchase." (*Sayre* v. *Townsends*, 15 Wend. 647; *White* v. *Carpenter*, 2 Paige, 238–41; *Hidden* v. *Jordan*, 21 Cal. 100; *Case* v. *Codding*, 38 Cal. 193.)

II. Appellants endeavor to make it appear that the time from which interest is charged is premature. This rests upon the proposition that a trustee ought to have a reasonable time to find investments. It would be absurd to apply it to a case like this, where the executor had sought and procured an order authorizing him to keep the funds deposited in certain banks of the city where he resided. It is for his failure to do this, and not for a failure to look up new opportunities for investment, that this responsibility is imposed upon him.

III. It is contended that the executor should not be charged with interest on money that he was required to keep on hand to meet monthly payments. Without pressing other considerations equally pertinent and forcible, it appears from his own testimony that he had an arrangement with Mr. Hersh-

field, whereby he kept the estate funds on open account for such purposes, and drew interest on the balances as they changed from day to day. Under this arrangement there was no reason whatever why he should not have kept the entire trust fund on deposit and drawing interest during the whole period involved.

IV. We come, now, to consider the question whether interest should be compounded in computing the amount with which the executor is chargeable. As a matter of fact, the appellant, in his reports returned to the probate court, has charged himself with compound interest with semi-annual rests, whereas the directions of the court below to the referee, which were respected in the computation, called for annual rests only. The rule of equity which here controls is that stated by the chancellor in *Brown* v. *Rickets*, 4 Johns. Ch. 303, 8 Am. Dec. 567: "It may be declared to be a principle of universal law that a tutor, curator, or trustee shall not make a profit of the trust money, and then retain the profit." The facts in proof are that the appellant had the use of the sums of money which are subjected to charges of interest, and that during this time he was himself a borrower from the Helena banks. How, then, shall the court see that "the trustee shall not make a profit of the trust money, and then retain the profit?" Clearly, by charging against him whatever he would have had to pay as interest to the banks if he had not had the use of the estate's funds. The rates are not disputed; indeed, the proof shows that the interest charged by the bank was above the rates fixed by the court; and it is a matter of common knowledge that bank loans are rarely made for longer than six months, which fixes the intervals of compounding.

V. On the question of the rate of interest chargeable against a trustee we conceive the law to be well settled. When there is simply a failure to invest he must account for what is commonly called statutory interest, meaning the rate provided by law in the absence of express contract; when there is any circumstance of malversation, or where he has mingled the money of the estate with his own, and cannot, or will not, account for the profits that belong to the *cestuis que trust* the

trustee must account for the highest current rate of interest, with at least annual rests. (Perry on Trusts, § 471, and note; *Barney* v. *Saunders*, 16 How. 537; *Hook* v. *Payne*, 14 Wall. 252–57; *Estate of Holbert*, 39 Cal. 597; *Raphael* v. *Boehm*, 11 Ves. Jr. 92; *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; 7 Am. Dec. 507; *Spaulding* v. *Wakefield's Estate*, 53 Vt. 661; *Farwell* v. *Steen*, 46 Vt. 678; *Jennison* v. *Hapgood*, 10 Pick. 77.)

VI. Paragraph VII of the appellant's brief is addressed to the executor's right to commissions prior to the final settlement of his accounts. We apprehend that this is no longer an open question in Montana. (*In re Dewar's Estate*, 10 Mont. 426 et seq.) But it is argued that the executor at an early period of the administration suffered a metamorphosis into trustee, and that in the latter capacity he is entitled to compensation. There is no claim that the appellant was made trustee by the terms of the will, or that any dual character was created by that instrument; on the contrary, it must be assumed that his relations to the estate would terminate with his discharge by the court as executor. The principle that controls is sufficiently stated in the authority here cited. (*Hall* v. *Hall*, 78 N. Y. 535.)

VII. Where an executor mingles the funds of an estate with his own, and thereafter enters into investments or embarks in speculations, it will be presumed that the trust funds were used in such investments and speculations. This presumption is confirmed where his explanations of what he has done with the trust moneys are vague, evasive, and unsatisfactory; where he is shown to have been a borrower at the time such investments were made, and by other circumstances such as are here in proof. (*Troup* v. *Rice*, 55 Miss. 278; *Crowder* v. *Shackelford*, 35 Miss. 324; *Fox* v. *Wilcocks*, 1 Binn. 194; 2 Am. Dec. 433; *Lupton* v. *White*, 15 Ves. 441; *Nixon* v. *Nixon*, 8 Dana, 5; *Weir* v. *Weir*, 3 B. Mon. 645; 39 Am. Dec. 487.) The burden of proof is on the trustee to show the amount of his own funds invested in such speculations, or otherwise the *cestuis que trust* will take the whole. (1 Story's Equity Jurisprudence, § 468; Perry on Trusts, § 128; *Austin* v. *Sprague Mfg. Co.*, 14 R. I. 471; *Russell* v. *Jackson*, 10 Hare, 204–14; *McLarren* v. *Brewer*, 51 Me. 402; *Seaman* v.

Cook, 14 Ill. 501–05; *Cannon* v. *Cooper*, 39 Miss. 784; 80 Am. Dec. 101.) The cardinal object of equity is to see that the trustee never profits by malversation of the trust funds. To insure this, the beneficiaries are permitted to make their election as to whether they will take the actual profits or interest in lieu thereof. (1 Story's Equity Jurisprudence, § 465; *Docker* v. *Somes*, 2 Mylne & K. 655; *Weir* v. *Weir*, 3 B. Mon. 645; 39 Am. Dec. 487; *Norris' Appeal*, 71 Pa. St. 106–13.)

VIII. Our statute permits the compromise of claims by executors or administrators "with the approbation of the probate court or judge." (§ 232.) There is no pretense that such approbation was secured in this case, and in its absence it devolved upon the executor to show that there had been no remissness on his part, and that the compromise was for the best interests of the estate. (*Schultz* v. *Pulver*, 11 Wend. 366; *Lowson* v. *Copeland*, 2 Brown Ch. 156; *Powell* v. *Evans*, 5 Ves. 839; *Caffrey* v. *Darby*, 6 Ves. 488; Woerner's American Law of Administration, and authorities cited in note 4.)

HARWOOD, J.—This proceeding was instituted in the probate department of the district court of Lewis and Clarke county, by Martha P. Ricker, petitioner, on behalf of Jesse C. Ricker, a minor heir and legatee of Joshua C. Ricker, deceased, to require an account, under the provisions of the Probate Practice Act, sections 254–70, from W. A. Chessman, executor of said estate, touching his administration, and disbursement of the property thereof.

It appears from the record that Joshua C. Ricker died on the 1st of June, 1875, a resident of Lewis and Clarke county, Montana, leaving a widow, Martha P., and four minor children; and an estate, consisting of money deposited in certain banks, to the amount of about $18,000, which, together with other assets, consisting of certain personal effects, and demands owing the estate, and an undivided partnership interest with M. A. Price in two ranches and certain cattle, etc., altogether amounted to the appraised value of $34,467.55, excluding the homestead. The management and disposition of this estate was directed by the last will and testament of decedent, whereof William A. Chessman was appointed executor.

By said will the testator devised to his wife, Martha P., the homestead and household furniture situate in the city of Helena, Montana, valued at $3,235; and directed the executor to pay out of the funds of said estate, to said widow, for the support of herself, and the support and education of said minor children, the sum of $200 monthly, for the period of five years, and thereafter, the sum of $250, monthly; providing, however, that as each of said minor children reached the age of majority, and received a share of said estate, respectively, as provided in the will, then such monthly allowance should be diminished to the extent of such child's proportion thereof.

The will further directed the executor, at such time, and for such prices, as he deemed for the best interest of the estate, to sell and convert into money all the effects of said estate; and that all such funds not otherwise required to be paid out, as provided by the will, be, as soon as practicable, invested in United States government securities, and that the interest accruing on such securities, save such part thereof as might be necessary to carry out the provisions of the will, be, from time to time, invested in like manner.

It appears from the first annual report by the executor, returned to the probate court, at the close of the first year of said administration, that the available funds of said estate, then on hand, after paying said monthly allowance for the widow and minor children, other current expenses, and certain debts of the estate and of said partnership estate, was $15,174.26. And thereafter, from year to year, the funds of said estate, with additional receipts from sales of property, collections of debts due the estate, and accumulations by way of interest on the funds on hand, ranged from the sum last stated upward to $19,818.43, which was the largest sum on hand at the close of any fiscal year during the administration, after meeting demands thereon by way of annuities, debts, and expenses of the estate, and of the partnership estate aforesaid, as shown by the annual reports returned and approved by the court. When the partnership affairs were closed out in 1883, and the estate received therefrom $4,350, the funds of the estate reached said sum of $19,818.43, as shown by the eighth annual report, returned that year, and approved by the probate

court. The next annual report, returned in 1884, shows a balance of $18,425 on hand. Out of this sum, in addition to other demands, there was paid to the eldest child, March 5, 1885, the sum of $4,534, on her arriving at the age of majority. The annual report for the year 1885, after such payment, shows a balance of $11,980. Thereafter, the annual reports show that the funds of said estate declined in amount, from year to year, by disbursement of annuities, current expenses, and the payment of two additional legacies to the second and third of said minor children, respectively, as they arrived at adult age; until 1891, when, as the report for that year shows, the funds of said estate were practically exhausted.

The funds of said estate were not invested in government securities, as directed by the testator in the will. The circumstances which are claimed to have justified the court in ordering a departure from the provision of the will in that respect, as disclosed by the record, appear to be as follows: That the investment of the funds in United States government securities at the time in question would have required the payment of about $3,000 premium; that said premium would, of course, have reduced the funds of the estate by that amount; and that with such reduction of the fund, the annual income from investment of the remainder in government securities would, according to the testimony, have been at the rate of five per cent interest during the first part of the administration, which rate was reduced to four per cent during the latter part of that period; but considering the sacrifice of premium, the rate of interest derived from said investment would have been, on the whole, about three and one-half per cent; that the income thus obtainable, as was plain, would fall far short of sufficient to meet the required annuities and other demands upon the funds of said estate; that from these conditions, apparent at the beginning of the administration, as well as at all times thereafter, it was manifest that to carry out the provisions of the will, requiring such funds to be placed in government securities, and only the interest derived therefrom used, as was evidently contemplated by the testator, and at the same time carry out the other provisions of the will as to the maintenance of the family, was impossible; because, the amount required for

the maintenance of the family alone was $2,400 per year, in monthly installments, for the first five years, and thereafter $3,000 per year, in monthly installments, for four and one-half years, until the eldest child became of age, which would require, during the first nine and one-half years of the administration, the payment of $25,500 for maintenance of the widow and children; and if this had been the only demand on the funds of said estate, it was manifestly impossible to put the estate funds, available at any time, into government securities, and leave the same in such investment, and make those payments; that if the funds of the estate had been invested in government securities it would have been necessary for the executor to sell and convert into money, from time to time, sufficient thereof to raise funds, in addition to the income, to pay the annuities and other demands on said estate. That therefore it appeared impossible for the executor, or any person charged with the execution of said will, to carry out the provisions thereof, and that to attempt such procedure would have been inexpedient, in view of the necessities of the family.

In view of these conditions, as appears from the record, soon after the return of the appraisement and inventory, on July 21, 1875, an application was presented to the probate court having jurisdiction of said estate, setting forth that the funds thereof, as shown by the inventory and appraisement, amounting to about $18,000, were on deposit in the First National Bank, People's National Bank, and L. H. Hershfield & Brothers' Bank, of the city of Helena, respectively, where the decedent had deposited the same in his lifetime, drawing interest at the rate of twelve per cent per annum; and asking the court to make an order "directing said money to remain in said banks, respectively, on interest, during the term of the administration of said estate, or at the option of said executor, during said term." Whereupon, the court, after consideration of said application, made an order, "that the request of said petitioner be granted; that the deposits on time of such moneys of said estate, drawing interest for the estate, in such banks, be, and is, hereby approved."

Thereafter, the administration of the executor proceeded from year to year during the course of sixteen years, with annual

accounts returned into court, verified by the affidavit of the executor, showing in detail receipts and disbursements in respect to said estate. Such accounts appear to have been considered and approved by the probate court, as provided in the Probate Practice Act, sections 260–70. But in this proceeding those accounts were all opened to any question which the petitioner desired to raise against them. (Probate Practice Act, § 269.) Under this privilege a large number of specifications were formulated and filed in this proceeding, contesting the correctness and good faith of said accounts. The evidence shows, however, that there was no attempt to sustain these charges by proof, with but one exception, and that was in respect to an item of $400, credited in one of the executor's annual accounts, for money claimed to have been paid out, on behalf of the estate, to a person employed at the partnership ranch of testator and said M. A. Price, as housekeeper. In this single attack upon the integrity of the executor's accounts the court below found against the accusation, and the evidence, as reported in the record, appears to be overwhelmingly in favor of the executor. So that, as a result of opening to the assaults of petitioner the sixteen annual accounts returned from time to time by the executor, and approved by the probate court, such accounts appear to stand unimpeached in every item. These accounts are in the record before us, and, after approval by the court, are by statute made evidence of their showing, subject, however, to be impeached on being opened to contest. (Probate Practice Act, § 269.) But after passing through such contest, without any disparagement, such accountings must, with more force, be considered as evidence of the showing therein made. Therefore, the result of the management of said estate by the executor herein set down is taken from said accounts; wherefrom it appears that during said period the executor accounted for $56,369.98, derived from said estate, including accumulations by way of interest on the funds on hand from time to time. Out of this, it is claimed by the executor, and not disputed, he paid to the widow and minor children, and to the three children first arriving at the age of majority, annuities and legacies amounting to $45,288.51; and that the liabilities of the estate, as shown by the annual reports

and accounts approved by the probate court, consumed the rest of the funds of said estate.

The increase of said estate during administration, shown in this result, was largely by way of interest on the funds on hand from year to year. From this source the increase appears to have amounted to between $14,000 and $15,000. The interest is returned in gross sums in the annual accounts, but the rate, according to the testimony of a witness called as an expert accountant to investigate said annual accounts, amounts to 7 9-10 per cent per annum compound, upon the funds on hand from year to year, on the average, for the whole period of administration. These results are not controverted by the petitioner, except as to the one item of $400, above mentioned, wherein the executor's account was sustained on the proof.

Notwithstanding these results, the court found and adjudged, in this proceeding, that, in addition to the amount so accounted for, the executor ought, equitably, to account to the heirs of said estate for the further sum of $51,000, and upwards ($51,684.73), on the 1st of June, 1891; and also for an undivided one-half interest in a certain tract of land in the city of Helena, the value of which is not specifically shown, but from the testimony in the record appears to be of large value. From this judgment, and the order of the court overruling the executor's motion for new trial, this appeal is prosecuted.

In the review of the case here it is not proposed to enter upon an inquiry as to the legality of said order of the probate court of July 25, 1875, authorizing the executor to keep said funds in banks, at interest, instead of converting the same into government securities; nor as to what additional responsibility for the safety of such funds not so invested the executor and his bondsmen may have assumed, by reason of such departure from the will; because neither party has drawn into consideration any such questions, as affecting the determination of this proceeding. Said order of the court, allowing such departure from the letter of the will, is only pertinent to this proceeding as part of the history of said administration. The executor would not be heard to question the legality of that order, or allowed now to depart therefrom, to the detriment of said

estate, nor has he sought any such position. And the petitioner, for obvious reasons, does not desire an accounting to proceed on the basis of the result which would have been obtained by investing in government securities, instead of accepting and retaining, along with the other heirs and legatees, the larger rate of interest acquired and paid over by the course pursued. Nor is it pretended that any loss whatever happened to the principal fund by reason of departure from the will. We observe, however, the court below took occasion to animadvert upon that proceeding, in strong terms of condemnation of the executor, for procuring such order from the court, and appears to regard it in some measure as ground for finding that the executor ought to be removed. Thus the action of the executor in that regard has been brought in question as bearing upon his good faith in making application for such order. Whatever additional responsibility for the safety of said fund may have been assumed by the executor in that matter, and whatever questions as to the legality of such departure from the direction of the will in that particular might be raised, if pertinent, we think the circumstances under which that course was adopted—the fact that it was decided upon to avoid foreseen sacrifice of thousands of dollars out of the limited funds of said estate, and according to undisputed testimony, after consultation and approval by the widow, the only legatee then of mature age, and upon advice of able counsel, affirming the legality thereof, and sanctioned by the order of the probate court, with the final return of interest to the beneficiaries in double the amount which could have been obtained from an investment, as directed by the will—repels all attempted condemnation of the motive which prompted the executor to that course.

We therefore pass to the questions demanding determination in this case, which have been found entirely sufficient for our most patient and painstaking consideration.

In proceeding with the consideration of these questions, and the law and authorities applicable, it must be borne in mind that in the case at bar the trustee has admittedly, at all times since he became executor, in respect to this estate, punctually, and as required by the conditions of the will, accounted for all

of the principal fund of the estate which came into his hands, together with interest on such funds from year to year, as the same remained in his keeping, at rates which, according to the testimony, equaled, on the whole, 7 9–10 per cent compound.

These results are admitted. The trial court, in treating the propositions involved in this case, "granted, that as a result more profit and gain inured to the widow and children than the testator contemplated when he made the will." So counsel for petitioner, in treating this appeal, in their brief, say: "As a matter of fact, the appellant, in his reports returned to the probate court, has charged himself with compound interest, with semi-annual rests, whereas, the directions of the court below to the referee, which were respected in the computation, called for annual rests only."

It is therefore apparent that there is no contention that this executor has failed to account for all the property and funds committed to his charge, together with interest on the funds, at the rates mentioned. But it is contended that he should be required to pay a higher rate of interest than he has returned on such part of the estate funds as were, from time to time, in his hands, not deposited in bank at interest, as provided by said order of court. That demand is the only basis of claim made against the executor in this proceeding, and thereon rests said judgment for the recovery of money, as well as the decree impressing a trust in favor of the heirs in certain lands of the executor, as aforesaid.

1. With this premise, it is first to be inquired whether the law warrants the court in declaring a trust interest in lands of the executor in favor of the heirs, upon the proposition that at a certain time he paid, in the purchase thereof, moneys in his hands belonging to the estate.

It is found in this case that at a certain time in 1882 the executor, in the course of his private transactions, bargained to purchase from Child & Young a tract of land in the city of Helena, Montana, for the agreed price of $10,000, paying at the time of the bargain the sum of $2,000, and obliging himself in the transaction to pay, at a certain date the following year, the balance of $8,000, whereupon a deed was to be delivered by the vendors, conveying said land to the purchaser; that in

the final consummation of such purchase in 1883 the executor made use of $5,000 of said estate funds. This is disputed, and the finding is excepted to as not sustained by proof. But we pass over this dispute, and consider the fact as found, together with the other facts existing in the case. It also appears, without dispute, as above shown, that the executor has long since, and without any delinquency, accounted, as fast as the terms of the will directed, to the legatees for said $5,000, which is claimed to have been paid in the purchase of said land, with interest thereon at the rate of 7 9-10 per cent compound.

Thus, the heirs have long since received and used said sum, with the interest returned thereon. And so granting that said sum of money has been traced into the purchase of said land, it has also been traced out of, and beyond, said land into the hands of the legatees in the execution of the trust. Still it is insisted that the heirs of said estate are entitled to a half interest in said land.

This involves a peculiar situation. It plainly requires the trustee to carry an interest in the land, for the benefit of the heirs, for years after they have admittedly been paid, not only all the principal of the trust fund, which is claimed to have been paid into the purchase of said land, but interest thereon. This would seem to be allowing one to reap where he had not sown, and left the seed to the harvest. At least it would be allowing the *cestuis que trust* to have and use the trust funds, with interest thereon at the rate paid, for his maintenance, and at the same time require the trustee to carry an estate in the land in question, for the benefit of the heir, without any of his funds remaining in said land.

It has already been pointed out that the only ground of demand against the executor is, that he ought to pay additional interest on such of the funds of the estate as were not kept deposited, at interest, in the banks, as will be more fully explained hereafter. By computing compound interest on such funds, at a higher rate than the executor returned, a claim arises against him for a certain sum over and above the amount he has accounted for.

Now, counsel for petitioner insist, that when this sum arising from such compound interest equals the amount paid

in the purchase of a certain tract of land, by appellant, during said administration, the heir has a right to take the land, at the purchase price, in lieu of an equal amount of the claim for interest against the executor. This is the position taken by counsel for petitioner, in responding to the appeal by the executor; and also in the appeal by petitioner (which is consolidated with this), wherein petitioner's counsel urge their exception to the ruling of the court in refusing to decree a trust in favor of the heirs, as to the whole tract of land above mentioned; and refusing also to declare a like trust interest, in favor of the heirs, in certain other tracts of land held by the executor. But the court impressed a trust upon lands of the executor only in the one case above mentioned, where it was found that in 1883 the executor had used, in the purchase of said piece of land, estate funds equal to one-half the purchase price; but which sum the executor had afterwards accounted for, with interest as aforesaid, without delinquency, in compliance with the terms of the will. He must, therefore, not only have accounted for said $5,000, which is claimed to have been paid in the purchase of said tract of land, but for a large amount of interest thereon, as it is not disputed that he returned 7 9-10 per cent annually, until such funds were entirely paid over to the heirs.

To impress upon lands of the trustee a trust in favor of the beneficiary, under these circumstances, would be allowing him, not only the advantage of compound interest, at rates determined on by the court, but would permit him to collect such interest, by selecting lands out of the trustee's estate, purchased during the continuance of the trust, at the purchase price paid therefor years before. It would not only give the heirs the advantage of compounding interest against the trustee, for having temporarily used trust funds, in order to draw away from him the profit of such use, but would also give them the further advantage of increasing that exaction, by whatever rate the property so selected might vouchsafe, whether it be thirty, sixty, an hundred, or a thousand fold.

Counsel for the petitioner undertake to sustain the decree of the court declaring said trust in the lands of the executor, and their contention that the court ought to have gone further,

and decreed to the heirs additional trust interests in the lands of the executor, by invoking the doctrine of equity, that the trustee shall not be permitted to make any profit by the use of trust funds. While this is a salutary rule of equity, and must be upheld, it does not warrant the court in transferring to the heirs lands of the executor, or interests therein, under the facts existing in the case at bar. We think this is abundantly shown from the foregoing examination. But that doctrine has been asserted with such confidence as sufficient to support the decree of the court declaring the trust, we will briefly examine the question from that particular point of view.

The question then is, if a trustee use trust funds, to the extent of half the purchase price of a tract of land, but afterwards, in the execution of the trust, accounts for the fund so used, with compound interest at the rate of 7 9-10 per cent, has the trustee profited by this transaction to the extent of half the value of such tract of land?

Suppose a man purchases a tract of land at the price of $10,000, and, not having funds at hand to pay the whole price at the time stipulated, he calls upon another having money on hand, who supplies the purchaser with $5,000, and the transaction thus stands for a time, until such $5,000 is called for, when the purchaser promptly returns the same, with compound interest at the rate of 7 9-10 per cent per annum. Now, suppose some years after such payment, the party giving such accommodation, pointing to said tract of land, then of the value of $50,000, and, relating the circumstances just narrated, insists that such purchaser is beholden to him to the extent of half said tract of land, at its present value, together with half of the issues and profits from said land, since its purchase—in other words, that the purchaser had actually profited by such accommodation, to the extent of one-half the value of said land, and half the issues and profits thereof since purchase—although the purchaser had long since repaid the loan with interest. This would, we think, strike practical men as an extraordinary proposition. But we have drawn into this illustration material facts which harmonize with those existing in the case at bar, except that in the illustration it was a voluntary accommodation and in the present

case trust funds were used, but we are simply inquiring now as to the measure of profit flowing from one to the other by such use of funds.

Then, if the profits of such accommodation were to be taken away from the purchaser, and transferred to the other, applying the theory proceeded upon in this case, it would require the transfer of a half interest in the land, and half the issues and profits since the purchase, less $5,000, dropped from the account of issues and profits, to offset the $5,000 which the purchaser had returned to the lender, making no account, however, of the interest which the purchaser paid for the use of said loan. And, on this theory of accounting for profits, the one whose $5,000 was thus temporarily used would find that he had first received back his $5,000, on demand, with compound interest; and thereafter, although the purchaser had carried the investment in the land as his own burden alone, until it is of great value, half of the land, worth $25,000, and also half of the issues and profits, less $5,000, had been handed over, merely to take away the alleged profit of the temporary use of said $5,000.

The only difference between the illustration and the accounting pursued in the case at bar is, that in the illustration it was a voluntary accommodation; and also in the account with appellant, the $5,000, dropped to offset a half interest in the land, accrued by way of compound interest, computed at higher rates than the executor had returned prior to the date of the purchase of said Child & Young tract of land. This does not materially change the application of the illustration.

But aside from the other untenable conditions already observed, the fact just mentioned, that the money upon which this trust is proposed to be declared is not, in reality, for part of the trust money found in said land from the time of purchase, but is a demand for interest accruing on moneys which were never even in said land would seem, in view of the authorities, to be sufficient to defeat all claim to a resulting or constructive trust in favor of the heirs in the present case. In order to sustain such a trust, on the ground that the land was purchased with trust funds, which were otherwise to be accounted for, the trust interest in the land must be founded on trust money

paid in the purchase thereof, and other demands cannot be offset for an interest in the land. (*Ducie* v. *Ford*, 138 U. S. 587, and cases cited; *Muller* v. *Buyck*, 12 Mont. 354.) There is some question made in the authorities whether a trust ought to be declared in such a case where only a moiety of the purchase price was paid by trust funds or whether a lien only should be fastened upon the land to secure reimbursement of the trust fund. Mr. Story seems to approve the latter course, as the more equitable and reasonable procedure. (2 Story's Equity Jurisprudence, §§ 1211, 1277 *g*. See also Perry on Trusts, § 128; *Munro* v. *Collins*, 95 Mo. 33.) If it appeared in this instance that the trust money had carried the burden of half the investment in said land from the time of purchase until the trust was declared it might then be necessary to decide between the distinctions just mentioned. But such is not the case here. The claim or money upon which the trust in the land is declared in favor of the heirs in this case arises for compound interest at a higher rate than the trustee returned. And when the date of the purchase from Child & Young is reached, in casting the interest account, $5,000 of the claim thus accruing for interest prior to that date is dropped to offset the amount constituting half the purchase price.

On the other hand, if it is proposed to claim an interest in said land for interest on the fund which was put into the land the difficulties of the problem are still further augmented. By that theory compound interest would be required from the trustee *for the use of the money* put into the land, and the *cestui* would be allowed on this very demand for compound interest (which is supposed to constitute the profit derived from the use of the trust money) to go back and take the land also, with its issues and profits from the time of purchase in payment of the interest. This would be recompensing the *cestui* for the use of his trust money: 1. By way of compound interest; and 2. By way of transferring to him the land, and the rents, issues, and profits of the land, besides compound interest.

Counsel for respondent urge, to support the judgment, that "the beneficiaries are permitted to make their election as to whether they will take the actual profits, or interest in lieu

thereof." It plainly appears that the court below allowed them to elect, and take both ways.

We have no doubt that with a closer investigation of these conditions, and more mature consideration of the authorities, the learned judge of the trial court would have denied the claims put forth that a resulting trust could arise in favor of the heirs, under the conditions shown in this case. For it cannot be sustained by the application of appropriate principles of equity, or by reason, or precedent.

2. As to the executor's commission: And herein the question to be determined is, whether or not an executor or administrator, where the conditions require the continuance of the administration over a period of years, can lawfully be allowed, at the close of each year, on the annual account, the commission provided by statute for the executor or administrator, on moneys of the estate actually disbursed during the preceding year, by way of compensation for the care and management of the estate.

That the executor in this case, in rendering his annual account, at the close of each year, charged the estate with the commission allowed by law on funds of the estate actually disbursed during the preceding year is not disputed. And this was approved, from time to time, by the probate court. In the present accounting the court below caused these commissions to be taken away from the executor; and not only so, but required him to pay interest on the amount of commission from the date of each allowance. The interest amounts to considerable more than all the commissions, and altogether, through that ruling, the executor is adjudged indebted to the estate in the sum of $5,806.86. To support the ruling of the court below, the case of *Estate of Dewar*, 10 Mont. 426, is cited. That case is far from supporting the ruling here under consideration. It seems remarkable that the court below, having before it such a clear and painstaking elucidation of the subject of commissions, and the construction of the statute providing therefor, as found in that case should have so shaped a ruling, as we find it in the case at bar, in this particular. In this case the executor, at the close of the year, charged commission for disbursements of the past year. He was thus

charging for services passed and finally completed. In the Dewar case it is said: "It is the law, that appellant's claim for fees being unsettled, unallowed, and inchoate, and the creature of the statute, it fell with the law creating it." Here, in the case at bar, the commissions taken away from the executor were *settled, allowed,* and approved by the court, for past services. Whereas, in the Dewar case, the administrator sought to charge commissions at the commencement, under the law as then existing, for all the period of the administration, ignoring all changes in the law, by act of the legislature, during said period. In the Dewar case the court further observed: "Appellant does not separate his services as to these two periods, and claim compensation upon services rendered in the three and a half months' period under the old law, and upon those rendered in the nineteen months' period under the amendment. If he did so, and claimed a higher percentage upon services fully performed and passed during the three and a half months' period, the argument of vested right would address itself to us with some force. (*People* v. *Pyper*, 6 Utah, 160.)"

It appears that in the course of the executor's administration, in the present case, the legislature reduced the rate of commissions, and the executor's commission was conformed to the change, as shown by indorsement on the fourth annual report of the executor by Judge Hedges. Thereby the learned judge applied the construction of the law as approved several years later in the case of *Dewar's Estate,* 10 Mont. 426. The ruling of the district court in this particular cannot be sustained.

3. What rate of interest should be required from the executor on funds to the credit of the estate not deposited in bank at interest, in view of the facts involved in this case? and further, as to the question of compounding interest in accounting with trustees.

As we proceed in the consideration of these questions we shall also digress sufficiently to consider an exception, on behalf of petitioner, to the ruling of the court in refusing to charge the executor the full amount of a certain debt, and interest owing said estate, where the executor had accepted, by way of compromise, and reported to the court, a less amount in settlement.

It appears that of the funds of said estate on hand at the death of the testator, some $6,000 was on deposit in the People's National Bank, then a banking institution in the city of Helena; that in 1878 said deposit amounted to $6,500; that said bank became insolvent, and went into the hands of a receiver about July or August of that year, and, on winding up its affairs, claimants against said bank received only 55 per cent of their demands; that about February or March prior to said failure the executor, having come into possession of information concerning said bank, which led him to doubt the safety of the estate funds therein, sought to draw such funds out, but the officers in charge of said bank refused to cash the certificate of deposit, claiming that it was a time deposit, and the sum was not demandable until maturity of the certificate at a later date; that the executor, however, insisted on drawing out such funds, and being at the time personally indebted to said bank for loans obtained therefrom in the sum of about $6,500, for which the bank held his individual note, the executor, in order to get the funds of the estate out of said bank, for the reason aforesaid, offset said certificate of deposit for the credit of the amount thereof on his note of individual indebtedness to said bank, and assumed the indebtedness of said bank to the estate for the amount of said certificate of deposit, namely, $6,500. This transaction substituted the executor as debtor to said estate in the sum of $6,500, in place of his indebtedness to said bank, for money theretofore borrowed and used in his affairs.

From this time on, during said administration, it appears there were moneys to the credit of said estate not deposited at interest in bank, as provided by the order of court, but interest was returned thereon, as above shown. The executor testified that he returned interest every year on all moneys to the credit of the estate, not deposited in bank at interest, at rates as high as the banks paid on deposits, and at no time less than 8 per cent, even after the banks reduced the rate below 8 per cent. This testimony is not inconsistent with the other facts shown; for, from the testimony of the bankers called in the hearing, it appears that the rate of interest paid by the banks on time deposits was reduced below 8 per cent about

the year 1883, and so continued thenceforward. This may account for the fact that on the whole the interest returned on the estate funds falls a fraction below 8 per cent. The rate of interest paid by the banks during said administration appears to have varied from 12 per cent on a descending scale to 6 per cent. The rate of 12 per cent prevailed for only a brief period after said estate came into the hands of the executor, when it was reduced to 10 per cent, which rate was allowed until about the year 1880, when 8 per cent was fixed upon, and prevailed until 1883; in 1883 and 1884 seven per cent was allowed, and thereafter 6 per cent.

In addition to the substitution of the executor as debtor to the estate in place of the People's National Bank for said $6,500, he charged himself with $1,500, in favor of the estate, under the following circumstances: It appears a debt was owing the estate in the sum of $1,950, by Guthrie & Norris, bearing interest at 2 per cent per month, and another debt owing by the same Guthrie, in the sum of $3,000, bearing interest at 1 1-8 per cent per month, through transactions had between the decedent and said debtors; that after the estate came into the charge of the executor, said debtors were unable to make payment, and their property affairs were not in such condition that payment could be enforced. The executor says in his testimony, that, under the circumstances, he thought it best to "nurse the matter along," and try to get payments from time to time, which it appears he did, and succeeded, in the course of time, in getting payments of principal and interest, altogether amounting to $5,225.98 on said $3,000 note; and payments of principal and interest on the $1,950 note, amounting to $3,137.12. It appears the debtors, for a time, conducted a butcher business, and considerable of said collections was obtained by the executor taking supplies from them for his household, and also for Mrs. Ricker and her family, and crediting the amount due for such supplies on said notes. But as the time approached when the eldest child arrived at the age of majority, and required her distributive share of the estate, as provided in the will, there was more than $1,500 of principal and interest together due on said debts; and in the mean time Norris, as the evidence shows, had failed altogether

financially. This balance the executor agreed to compromise with Guthrie—the only one of the debtors from whom there was any prospect of obtaining payment—at $1,500, if he would then raise and pay that amount, so that the executor could ascertain what amount of such collection could be counted on for such distribution. Guthrie testified in this hearing that he endeavored to raise said sum agreed upon as a compromise of said debt, but could not; that he then arranged with the executor to assume said sum as paid, and credit the estate therewith, promising to pay said sum shortly thereafter; that the executor made such credit accordingly, and thereby put to the credit of said estate $1,500 which he had not actually collected, and of which, according to the evidence, the executor never received more than $700 from said debtors. Yet the executor accounted for said $1,500, as collected, with interest thereon, along with the other funds, as heretofore shown.

The petitioner, in his appeal, insists, notwithstanding these facts, that the executor should be charged with the amount he rebated from said claim by way of compromise. This demand is based upon the showing from the public records of Lewis and Clarke county, that in March, 1880, there was conveyed to said Guthrie and John H. Ming, jointly, for a consideration of $2,400, stated in the deed, "the south half of the south half of the northwest quarter of section 29, township 10 north, range 3 west, less four acres"; that the title to said property so remained until April, 1883, when, it appears from the record, Guthrie executed a mortgage of his interest to said Ming, to secure the sum of $6,000, and that in December, 1883, as shown by such record, Guthrie divested himself of the legal title to one-half interest in said land by absolute conveyance, for a stated consideration of $5,500.

From this showing of the record the petitioner contends that it appears said claim could have been enforced in full from Guthrie, by seizure of said land, and, therefore, the executor should be charged the full amount of said claim and interest for failing to make such seizure.

The executor testifies that during all the time said indebtedness of Guthrie & Norris was owing to the estate said debtors were insolvent, according to the information gained by the

executor, on diligent inquiry; that he did not bring suit against them, for the reason that he thought it more prudent to proceed as aforesaid in trying to collect said debts; that, in his view, to attempt to enforce payment by suit might have driven the debtors into such a condition that they could pay nothing, while by the course the executor pursued he was obtaining some payments. The executor also answered in his testimony that he could not say positively whether he searched the records to find whether the debtors had real estate, or interests therein, subject to attachment.

The testimony of Mr. Hershfield, a banker, is also to the effect that during all the time in question claims against said debtors were not considered good; that their paper was not negotiable, and they were not regarded as financially responsible.

We think the court, under the circumstances shown, justly refused to charge the executor any more than he had returned, on account of said demands against Guthrie & Norris. The mere fact that the legal title to a piece of land comes into the name of an individual is not conclusive evidence that such property is subject to execution against such individual. (*Vaughn* v. *Schmalsle*, 10 Mont. 186.) Nor is the record of such transaction, in relation to a piece of real estate, evidence that the amount set down in the conveyances represents the value thereof. Such proof alone, without showing the real value of the land, scarcely rises to any showing inconsistent with the testimony of the other witnesses, to the effect that said debts were not enforceable because of the insolvency of the debtors. Guthrie says, in his testimony, that he does not think a judgment could have been enforced against him, and he appears to have been the most responsible, as well as the most active, of the two debtors in trying to pay said debts.

It is our opinion that the court below not only was justified in refusing to charge the executor with any more than he had returned on account of said claims against Guthrie & Norris, but the court should have also refused to require the executor to pay further interest on said $1,500, inasmuch as it was clearly shown that in giving credit therefor, before the actual collection of that amount, the executor involved himself in a

personal loss of $800, besides having returned interest on said $1,500, from the time it was so credited to the estate, as above shown.

Regarding the rate of interest which ought to be imposed on the executor, the court below so ordered the accounting, that he should be required to pay compound interest on all funds to the credit of the estate, not deposited at interest in bank, at the rates of 18, 15, and 12 per cent per annum compound, during stated periods of the administration. The sum so accruing by those rates was compounded by annual rests to carry the interest over as principal. The rates required are, according to the evidence, near the maximum rates shown to have been obtainable on loans by banks, during the periods stated, there being no restriction by law on the rate of interest which might be agreed upon between borrower and lender. The legal rate provided by statute, enforceable on demands, in the absence of an agreed rate, during the same period, was, and still is, 10 per cent per annum. The statute in force since 1872 on this subject reads as follows: "Creditors shall be allowed to collect and receive interest, when there is no agreement as to the rate thereof, at the rate of 10 per cent per annum for all moneys after they become due, on any bond, bill, promissory note, or any other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment until satisfaction of the same be made; likewise on money lent, or money due on the settling of accounts, from the day of such settlement of accounts between the parties and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay." (Comp. Stats., div. 5, § 1237.)

We have been unable to find authority to support the proposition that a court has jurisdiction to impose arbitrary rates of interest above the statutory rate, in an equitable accounting with a trustee, although courts of equity frequently require a lower rate in such accountings, as an equitable rate.

In England there appears to have been a rule of equity requiring what is called an *equitable* rate of interest, in account-

ing with trustees; and this rate is uniformly lower than the *legal* rate. The legal rate there being 5 per cent, equity usually required 4 per cent in such accountings, under the name of "equitable interest in mitigation of legal rates." (Fonblanque's Equity, 443, note.) Mr. Spence, the standard English authority on Equity Jurisprudence, says: "Where it appears that the trustee or executor has improperly or unnecessarily kept balances, or any considerable portion of trust moneys in his hands, he will be charged with interest on what he has so retained, generally at 4 per cent, but under special circumstances at 5 per cent." (2 Spence's Equitable Jurisdiction, 920.) From a passage in the opinion delivered by Lord Chancellor Brougham in 1834, in *Docker* v. *Somes*, 2 Mylne & K. 666, it appears conclusively that English courts of chancery did not feel at liberty to impose arbitrary rates of interest upon trustees, in such accountings, exceeding the legal rate.

As to the rule in the United States, Mr. Perry, in his examination of the subject, says: "In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is whether simple or compound interest shall be imposed." Further along, in summing up his examination, he says: "The rate established by law as the legal rate, in the absence of special arrangements," governs courts of equity in accounting with trustees in this country. (2 Perry on Trusts, § 468.)

Mr. Story expresses the same view, saying: "And the trustee, by mixing trust money with his own, at his banker's or otherwise, will become responsible for the replacing of the money, and *lawful* interest during the intervening period. . . . . So, too, when the trustee makes an improper investment of trust funds he becomes responsible for the same, with interest." (2 Story's Equity Jurisprudence, § 1277 *g*.)

The same conclusion is reached by Mr. Page in his recent research on "Executors and Administrators," found in 7 Am. & Eng. Ency. of Law, 426–29, with copious citations.

In *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507, although one of the severest cases in this country in its

exaction from the trustee, there appears to have been no thought of imposing rates higher than the legal rate of 7 per cent. (See, also, *Clarkson* v. *De Peyster*, 1 Hopk. Ch. 426.) In California we find it held that the legal rate of interest should not be exceeded in such accountings. (*Estate of Clark*, 53 Cal. 355; *Merrifield* v. *Longmire*, 66 Cal. 180; *In re Eschrich*, 85 Cal. 98.)

There is a passage in *Cruce* v. *Cruce*, 81 Mo. 676, relied on by respondents to sanction the requirement of interest above the rates fixed by statute; and while it may be so construed, we do not think such was intended to be held, for, in that case, only the legal rate of 10 per cent was allowed; and under the passage relied on is cited *Frost* v. *Winston*, 32 Mo. 489, where it appears the rate charged was that prescribed by law.

In the examination of a great many cases on this subject, and especially all of those cited by respondent, we fail to find any authority contradicting the text of Mr. Perry, that the legal rate is not exceeded, unless a lawful contract provides for a higher rate.

We now pass to a brief examination of the question of compounding interest in accounting with trustees.

Near the close of the last century the remedy of compounding interest in such cases appears to have come into vogue in the courts of equity of England and the United States, as a convenient and potent remedy to draw from delinquent trustees the actual or presumed profits derived from the use of trust funds; although prior to that time it appears to be acknowledged that the law was administered with great laxity in that regard.

In 1805 we find Lord Elden, in his examination of the question of compounding interest in such accountings (*Raphael* v. *Boehm*, 11 Ves. 92), so much in doubt as to the proper practice, that he postponed the consideration, to give time to make special inquiry on the subject, observing that it was a matter of great importance. And for his information, it appears he went not to reports or treatises, but caused inquiry to be made of the masters in chancery as to their understanding of the correct practice. (See, also, an examination of this subject, from an historical, as well as legal, point of view, by Lord Chan-

cellor Brougham, in *Docker* v. *Somes*, 2 Mylne & K. 655; by Chancellor Kent, in *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; by Chancellor Sanford, in *Clarkson* v. *De Peyster*, 1 Hopk. Ch. 426; by Mr. Justice Grier, in *Barney* v. *Saunders*, 16 How. 535; Perry on Trusts, and cases cited, under § 468; *Cruce* v. *Cruce*, 81 Mo. 676; the monograph by Mr. Page, of the Pennsylvania Bar, on "Executors and Administrators," 7 Am. & Eng. Ency. of Law, 425 et seq.; and the elaborate note to *Walls* v. *Walker*, 99 Am. Dec. 296.)

There is no doubt the doctrine has been applied during the present century, where circumstances appeared to warrant, as shown by an examination of the cases; but as to the special conditions to which it ought to be applied, and as to the rate of compound interest considered equitable, there seems to be much diversity of opinion. Sometimes the rule has been exerted with extreme rigor against a trustee guilty of fraud in respect to the trust funds, whereby he sought to enrich himself therefrom, as was done by Lord Chancellor Loughborough, in 1798, in *Raphael* v. *Boehm*, 11 Ves. 92. Of this case, Lord Chancellor Brougham says (see *Docker* v. *Somes*, 2 Mylne & K. 655), it was the strongest instance of compounding interest against a trustee in England; but it was a case where "a gross breach of trust had been committed; for the large sum of £30,000 was expressly directed to be laid out for accumulation, and the executor having thought proper to employ it in his own trade, the court ordered him to be charged with interest at 5 per cent from the time of the executor's death, with half yearly rests, and interest for the intermediate times. All the judges who have mentioned this decree have considered it severe." And he adds that, in this "most remarkable case, which indeed is always cited to be doubted, if not disapproved, the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it."

As has been mentioned, the case of *Schieffelin* v. *Stewart*, before Chancellor Kent, in 1815, is considered one that applied the rule with great severity. Therein it appears the executor had retained in his hands constantly for some ten years thirty-three thousand dollars of trust funds, "without

producing any benefit or advantage to the estate"; and the chancellor approved the report of the master, charging the executor the legal rate of 7 per cent interest, with annual rests for compounding the same. One of the cases relied on by Chancellor Kent, in support of that judgment, was *Raphael* v. *Boehm*, 11 Ves. 92, but, of course, without knowledge of the estimate in which it was held by the English bench, as appeared by later comments. And the case of *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620; 7 Am. Dec. 507, notwithstanding the great weight of authority it carried by reason of the acknowledged learning and judicial ability of the chancellor who delivered the opinion, in its turn, seems to have been shaken by subsequent adjudications in New York, at least as to the rigor with which it applied the rule of compounding interest. (*Clarkson* v. *De Peyster*, 1 Hopk. Ch. 426.)

Mr. Perry states, as his deduction from the authorities, that: "It is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay they will be charged with interest at the rate of 4 per cent; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of 5 per cent; and, in certain special cases of misconduct, the court will order annual or semi-annual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: 1. If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name, or in the name of the firm

of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements. This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and if they make more than legal interest, they shall pay more, as if they make usurious loans they shall be charged with all their gains from the use of the money. If the trustee cannot show what amount of interest he has received he shall be charged with legal interest from the time when the regular investment ought to have been made. There may be an exception to the rule that a deposit of the trust money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty." (1 Perry on Trusts, § 468.)

There are cases of comparatively recent date, however, in which compound interest has been held proper by the supreme court of one state, and refused by that of another, where the cases appear to be surrounded by quite similar circumstances. This will be seen by a comparison of *Clark's Estate*, 53 Cal. 355, *Merrifield* v. *Longmire*, 66 Cal. 180, and *In re Eschrich*, 85 Cal. 98, with the case of *Cruce* v. *Cruce*, 81 Mo. 676, where, apparently under very similar facts, the California court allowed 7 per cent, compounded by annual rests; while the supreme court of Missouri allowed only simple interest at the legal rate of 10 per cent. But in the treatment of the latter case, after referring to the fact that "the rule of exacting interest from delinquent trustees has nowhere been enforced more rigorously" than in Missouri, it was said that if the interest had been compounded by annual rests, "at the low rate of 6 per cent," it would have been allowed to pass. "But, as every case must be determined according to the facts and circumstances peculiar to it, I am satisfied," says the author of that opinion, "that it would be inequitable to order interest compounded at the high rate of 10 per cent per annum against the respondent. My reasons for this conclusion are as follows: 1. The account extends through fifteen years. The result of

the computation, like all such arithmetical results, would be surprising and excessive. It would, in my judgment, exceed what could be expected from any prudent and careful administration of the estate under ordinary circumstances. I think it would be a marvelous achievement for any trustee of ordinary skill and prudence to keep a fund of $5,000 or $6,000 so constantly and securely invested for a period of fifteen years as to produce the net result of compound interest at 10 per cent per annum. In the ordinary course of events there would necessarily be intervals of irregular length between investments, not to say any thing of possible loss and depreciation of security. The ability of investing the interest annually, as soon as collected, may well be doubted when we consider its moderate volume, and the frequency with which it would have to be put out. The exaction of compound interest at such a high rate, for so long a period of time, would, in my judgment, be a departure from the leading principle, which requires the chancellor to approximate, as near as possible, the actual or presumed gains and profits of the fund." (*Cruce* v. *Cruce*, 81 Mo. 676.)

The theory upon which the court exacted such extraordinary rates of compound interest from the executor in the case at bar was, that, according to the testimony of the bankers, money could have been loaned at the time in question at such rates. Nowhere in the record is there shown any proof as to the net result of loaning money during a given period, even by such experienced financiers as bankers, after deducting expenses and losses, in order to ascertain the net profits which could be derived from the use of money, by way of interest. Without any such inquiry, the rates of 18, 15, and 12 per cent were designated by the court, for stated periods of the administration, and the referee was directed to compute at those rates, during such periods, compounding by annual rests.

Would it not be somewhat analogous if, in a given case, it were found that a bailee of another's carriage-horse had kept and used it for the period of say five years; and in order to charge the bailee with the profits of such use the court should take proof of the price for a livery animal of like quality for one day, and without further inquiry as to expense of feeding

or care, or as to the time such animal would ordinarily lie idle, the court should order the case to a referee to cast the aggregate for the whole period at the price stated for a day, and enter judgment accordingly? If liverymen could so reckon profit their prosperity would no doubt be far different than practical experience demonstrates.

So, if loans of money were always promptly returned at maturity with the stipulated interest, and the gross rate was never diminished by loss or delay through deterioration of securities, death, disaster, or fraud, nor by the expense of constant attention to such affairs, the employment of professional services, of litigation, and so forth, even then it would not be possible in practice to make the gain compound along the line of the highest rates attainable; because in practice it would not be possible to reloan the money and the accumulated interest the instant it was due. If the debtor, through stubborn neglect or misfortune, is delinquent in payment the law must be resorted to, and for such delay it will not require from the delinquent debtor compound interest; so that in demanding return of compound interest at the loaning rate in such instances (which are not infrequent in experience) the law would demand on the one hand of the trustee what it would not allow him to collect on the other.

The problem of compound interest, when set in motion, moves on for its allotted period with the certainty of time and mathematics. All other conditions are assumed. It considers no delay, no failure, no expense—its assumed creditors, forever, with the regularity of perpetual motion, obey an assumed demand—and the gain in turn is presumed to be reloaned the instant of its payment. The problem contemplates constant accretion by a composite process, but no diminution; it omits no farthing, nor allows any to escape when gathered—not even so much as the expense of postage, or the wear of shoe-leather, to make a demand. The thriftiest management and most fortunate consummation in practice cannot hope to reach the quotient gathered by the problem, in the long run, unless odds are given in fixing the rate to be compounded, to offset the expenses, delays, and failures met with in practical experience. But with allowance for such contingencies in fix-

ing such rate, no doubt common experience will admit that it is practical to gain compound interest; and it has been, no doubt justly, held equitable in accounting with trustees, where they have in their hands moneys for accumulation, or which was made to accumulate, or has been used for the trustee's profit, to require compound interest. But the rate must be fixed with due consideration, or the result will be found out of all proportion to what could have been accomplished in the field of practical affairs. We are suggesting here nothing new, for these conditions have undoubtedly been considered, if not mentioned in detail, by courts of equity, as shown in the fact that they have in general gauged their requirements accordingly. But, sometimes, as might have been expected in the application of an abstract mathematical rule, the exact relations of which, to practical results, is not easily detected, some hardship may have been worked.

There is evidence in the record to the effect, that from time to time during the period in question, banking institutions contracted to pay, for the use of funds left with them for a stated time, a certain rate of interest per annum. That is the only evidence in the record which approaches a safe criterion from which there might have been found the measure of net profits—or, in other words, the net earnings which could be counted on for the use of money by way of interest. While this testimony did not take that form of inquiry exactly, it is evidence of what money could have earned placed in such institutions, they insuring the safety thereof, so far as their own responsibility went, and bearing the expense and loss incident to its use. The tendency of this evidence, more than any other in the record, is to show what such financial institutions could afford to pay for the use of money, and insure its safety, and bear the expense and loss incurred in handling. Who are more likely to get greater profit from the use of money, under fairly safe and conservative conditions of handling, than bankers? If there are other financiers or business men who can do better is it not likely bankers would learn the way and adopt it?

But if we measure this executor's returns by that criterion a balance is found in his favor; for, when the rate in the banks

went below 8 per cent, the evidence is that he kept on returning at that rate on moneys to the credit of the estate not in bank.

If we look to the precedents in the books we find, too, that the returns of this executor, made without delinquency or any suspicion of fraud, rise above the exactions from trustees, by way of compound interest, in cases where their accounts were delinquent and conduct culpable. Shall a judgment of greater severity be pronounced in this case than in such? It appears from numerous precedents from all sections of the country, that this case would, in those courts, be dismissed; because the executor has voluntarily and promptly made returns of income double what could have been obtained by the course contemplated by the testator's will, and more than the banks would have allowed during considerable portion of the time; and more than the courts have found equitable to exact in accountings with trustees whose conduct was found grossly detrimental to the interest of the estate. This must be admitted. And even granting the worst that has been asserted against the executor, in the case at bar—the temporary use of certain of the trust funds in private affairs, which is made the occasion for exacting compound interest in several cases, as we have seen—still it appears, and is not disputed, that this executor has seen to it, that the estate in no way suffered detriment therefrom, and gained considerably thereby. If a man's foot slip, or if he stumbles, and then regathering himself walks uprightly, and delivers his burden in advance of all others, without one whit missing, shall he be turned upon, and scourged with a severity exceeding that laid upon one who refuses to proceed with the discharge of his duty altogether? It may be answered that if one who waivers is allowed to go without punishment, others will walk unsteady. This answer does not meet the situation. If he was found delinquent it would be time to consider of his punishment, but if not finding him delinquent in any respect more is exacted than for entire neglect absolute default would be encouraged by such unjust judgment.

But laying aside all figures of speech, as not much to be indulged, in judicial investigations, and viewing all phases

of this case in the plainest fashion, it appears that if heavier judgment is laid on such a case as this, the court will thereby designate the plane of its exactions much higher than any court has attempted to maintain, so far as we have been able to discover.

With the carefulest investigation of the law and facts, our deliberate judgment is drawn to a negative conclusion on every vital point in this case. There is no hardship in this, for the executor must have managed the affairs of the estate with solicitude, for the welfare of the heirs, and that his management has been largely fruitful of benefits to them is frankly admitted. Such results do not come from indifference or neglect.

In rendering the extraordinary judgment in this case we think the learned judge of the court below must, without the deliberation usually manifested, have adopted views urged by the forceful eloquence of petitioner's counsel. But things only assumed, in whatsoever eloquent phrase, or forms only painted, however real they seem at first impression, cannot support the judgment of a court.

An order will therefore be entered reversing the judgment in this proceeding, and remanding the case, with directions to enter judgment in the court below dismissing this proceeding at the cost of petitioner.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

ON REHEARING.

Per CURIAM.—Since the determination of this appeal, motion for rehearing has been presented and given careful consideration, besides allowing counsel the unusual privilege of argument, to more fully expound the grounds on which rehearing is demanded. Nevertheless, there has been no exposition of points wherein the court overlooked or erroneously applied any pertinent or controlling authorities or material facts in the original determination. On the contrary, this retrospection of the case, in the light of motion for rehearing, tends to confirm the views of the court heretofore expressed, as fully in accord with the authorities and facts, and that a

just and proper determination was reached. The same will therefore be allowed to stand as originally announced.

This motion for rehearing, however, raises a new point in the case, which hitherto was neither presented in the brief nor in the argument on appeal; nor does it appear that consideration thereof was had in the trial court—namely, that in certain years the probate court of Lewis and Clarke county, then having jurisdiction of said estate, allowed the executor a higher rate of commission by 1 per cent than the statute then provided; in other words, it is asserted that, at certain times when 5 per cent commission was allowed the executor, the statute prescribed only 4 per cent. It is obvious, this being a court of review, and not of original inquiry in these matters, it should not enter upon an investigation, or make any order, touching this question, for the reason already mentioned—that no inquiry or determination on that feature of the case appears to have been made by the trial court. Therefore, there is no order or determination of the trial court to review on that point. The trial court denied the executor all commissions, on grounds which did not touch the question of his having been allowed by the probate court a rate exceeding that provided by statute. That particular question seems not to have been adjudicated. But whatever inquiry or order concerning the readjustment of said commission, on the ground alleged, may be pertinent, it should, in the first instance, be proceeded with in the trial court. The motion for rehearing will therefore be denied.

WATSON, APPELLANT, v. O'NEILL ET AL., RESPONDENTS.

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[Submitted March 29, 1893. Decided March 12, 1894.]

BOND—*Reformation—Evidence.*—A bond given in connection with a building contract, and conditioned for the furnishing of all labor and material necessary to the completion of the building, as specified and shown on the plans furnished by the architect, need not be so reformed, before a recovery thereon, as to refer to said contract, since the instruments, being contemporaneous and parts of the same transaction, may be construed together to explain each other under section 532 of the Code of Civil Procedure.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on bond. Judgment was rendered for the plaintiff below by BUCK, J. Reversed.

William M. Blackford, for Appellant.

Henry C. Smith, for Respondents.

PEMBERTON, C. J.—It appears that respondents, who were defendants in this action, executed and delivered to plaintiff, as sureties, an instrument as follows:

"Know all men by these presents, that Jos. O'Neill and Jacob Switzer, of the city of Helena, county of Lewis and Clarke, state of Montana, are held and firmly bound unto John R. Watson, of the city of Helena, county of Lewis and Clarke, state of Montana, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said John R. Watson, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, heirs, executors, and administrators unto John R. Watson firmly by these presents. Sealed with our seals, and dated this third day of August, one thousand eight hundred and ninety-two. The condition of the above obligation is such that, should Frederick Eide begin and complete the brickwork on John R. Watson's business block, as follows: Frederick Eide is to furnish all the material, lime, sand, brick, and all labor necessary to the erection and completion of John R. Watson's business block, on Main St., as specified and shown on the plans as furnished by W. E. Norris, architect—then the above obligation to be void; otherwise to remain in full force and virtue.

FREDERICK EIDE. [SEAL]
"JOS. O'NEILL. [SEAL]
"J. SWITZER." [SEAL]

This action was brought against said sureties on said bond to recover from them the sum of five hundred and forty-eight dollars and eighty-four cents damages, alleged to have been sustained by plaintiff through the failure of defendant Eide to furnish certain material and labor necessary to, and which were

used in, the construction of said building in accordance with the plans of the architect, mentioned in said bond. In bringing this action the appellant proceeded upon the theory that the bond above referred to is defective, in that it does not refer sufficiently to the contract to cover the damages sued for, and asks that said bond be so reformed as to refer to the building contract, and cover the damages as alleged, or the breaches thereof, and, after being so reformed by the court, that he have judgment against these respondents for the amount of such damages. So he inserts in his complaint a series of allegations to the effect that it was the intention of the parties to said bond that it should refer to said building contract, in addition to the references in the bond to the "plans as furnished by W. E. Norris, architect."

Answer was made by defendant sureties, Switzer and O'Neill, denying all the allegations of the complaint, and trial ensued, whereat, upon the close of the introduction of evidence on behalf of the plaintiff, respondents moved the trial court for judgment of nonsuit as to respondents O'Neill and Switzer, on the ground that the evidence does not prove, or tend to prove, any liability on the part of said sureties, which motion was sustained by the court, and judgment for nonsuit entered accordingly, from which judgment plaintiff prosecutes this appeal.

It appears from the case shown by the record that the motion for nonsuit was sustained upon the ground that no sufficient showing was made to warrant the court in reforming the bond in the respect sought by plaintiff, without consideration as to whether, upon the whole case made out, plaintiff was entitled to the recovery of damages sought to be recovered upon the bond, as executed, without reference to reformation. The bond as executed is pleaded, together with all the facts relating to the failure of the contractor, Eide, in constructing said building and furnishing the material and labor therefor, as provided by the plans of the architect, referred to in said bond, and the payment thereon, which involved the damage sued for. And, although the plaintiff sought a reformation of said bond to secure the extension of the terms thereof to include the building contract, as well as the plans and specifications,

we think the question arises, and should be considered by the court, first, whether plaintiff is entitled to the relief sought against said sureties, under the terms of said bond, and pleadings and proof, without reformation of the bond, as sought by plaintiff in this action; and, if that proposition should be resolved in the affirmative, it would leave out of consideration the whole question of reformation of said instrument, and the allegations of the complaint setting up the facts upon which reformation was sought would stand as surplusage. In other words, in the view of this court, the question arises whether the trial court was warranted in granting a nonsuit, thereby denying plaintiff all relief in the action, upon the ground that he had not made out sufficient facts to sustain his demand for reformation of said instrument.

We are of the opinion that the whole question of reformation of said bond was unnecessarily brought into said action. That the terms of the bond, as executed, and providing that the sureties guaranty in the sum of one thousand dollars, to the effect that said Frederick Eide, the contractor and builder, should "begin and complete the brickwork on John R. Watson's business block, as follows: Frederick Eide is to furnish all the material, lime, sand, brick, and all labor necessary to the erection and completion of John R. Watson's business block, on Main street, as specified and shown on the plans as furnished by W. E. Norris, architect," were sufficient to sustain this action for the recovery of the sum of money which the plaintiff may have been compelled to pay out towards the furnishing of the material and labor necessary for the erection and completion of the structure according to said plans, as alleged in the complaint, without any reformation or extension of the terms of said bond.

We think this action involves the construction and application of said instrument to the subject thereof, rather than the question of the reformation of the instrument. In construing and applying the instrument to the subject to which it relates, the court was entitled to receive evidence of the "circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, ... so that the judge be placed in the position of those whose

language he is to interpret." (Code Civ. Proc., § 632.) And when the order of the nonsuit was entered, as appears from the record, the court had before it, as disclosed in the evidence, sufficient of such circumstances and situation of the parties to the subject matter of said bond to enable it to clearly find within the intendment of said instrument an obligation on the part of the sureties to guarantee the furnishing of the material and labor for the construction of the building, portrayed by the plans mentioned in the bond. (Code Civ. Proc., §§ 631, 636, 638.)

It is evident from the record that the plans and specifications of the building, the contract for the erection and completion thereof, and the bond sued on are all contemporaneous, and parts of the same transaction—in fact, parts of the *res gestæ*—and, as such, should be construed together, in order to explain each other, and determine the rights, obligations, and liabilities of the parties thereto.

For the reasons stated above, the judgment appealed from should be reversed, and it is so ordered.

Reversed.

HARWOOD and DE WITT, JJ., concur.

STATE EX REL. HERFORD v. COOK, STATE AUDITOR.

[Submitted March 6, 1894. Decided March 12, 1894.]

COUNTIES—*Classification—Evidence.*—When a portion of one county is attached to another county, the last assessment on the territory so attached may be ascertained by reference to the assessment books of the former county in determining the classification of the latter county as established by the assessed valuation of property within its boundaries.

ORIGINAL proceeding. Application for writ of *mandamus*. Granted.

O. F. Goddard, for relator.

Henri J. Haskell, Attorney General, for the state, respondent.

DE WITT, J.—The relator is, and since January 1, 1893, has been, county attorney of Yellowstone county. The respond-

ent is state auditor. Relator prays that a writ of *mandamus* issue, requiring the state auditor to draw a warrant in favor of relator for certain sums, which he claims are due him as county attorney of a second-class county. (Acts 2d Sess. p. 235, approved March 6, 1891.) The state moves to quash the writ. The contention is whether the petition shows that Yellowstone is a second-class county. A second-class county must have an assessed valuation of over $4,000,000 and less than $8,000,000. (Act March 6, 1891, *supra.*) In 1892 the assessed valuation of Yellowstone county was $3,800,000. On October 15, 1892, a portion of the Crow Indian reservation duly became a part of Yellowstone county. The property on this portion of the reservation was, in 1892, assessed by Custer county at $817,037. After this portion of territory became part of Yellowstone county, October 15, 1892, the same property so assessed remained thereon. It is therefore the fact that when relator was elected, November, 8, 1892, and qualified, January 1, 1893, the assessed valuation of Yellowstone county was composed of two items: 1. $3,800,000—the Yellowstone assessment of 1892; and, 2. $817,037, an amount assessed by Custer county, and added to Yellowstone county by the accretion of the piece of the reservation. These two sums aggregate $4,617,037. Therefore, prior to relator's election and qualification, his county had the assessed valuation of a second-class county. (Acts 2d Sess., p. 235.) This fact entitles relator, under the provisions of the law passed (March 6, 1891) prior to his election and qualification, to a salary as a second-class county officer. This the state auditor refused, hence this application for a writ of *mandamus.*

The only question is as to the evidence by which it is shown that Yellowstone is a second-class county. The evidence by which it is shown is Custer county's assessment in 1892 upon the property, which at the time of the assessment was in Custer county, but which went, with the land on which it was found, into Yellowstone county, October 15, 1892. That assessed valuation was $817,037. That fact could be ascertained on January 1, 1893, when relator's term of office commenced, by no method other than the assessment books of Custer county. We are satisfied that it sufficiently appears

that when relator was elected county attorney, and when he qualified, Yellowstone was a second-class county. He is therefore entitled to this writ. But counsel stated in argument that relator at this time demands a warrant from the state auditor for only the period of time since December 1, 1893. Therefore let the writ issue commanding the state auditor to draw warrants in favor of relator in such amounts as shall pay him as far as the state is liable for his salary at the rate of $1,500 per annum, since December 1, 1893.

Writ issued.

PEMBERTON, C. J., and HARWOOD, J., concur.

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PARROTT, APPELLANT, v. McDEVITT, RESPONDENT.

[Submitted February 5, 1894. Decided March 12, 1894.]

APPEALS—*Orders—Bill of exceptions.*—On an appeal from an order a bill of exceptions which contains all the papers properly certified which are required on appeals from orders, will not be stricken from the record upon objections to its settlement and service, since the matters included in the bill of exceptions are properly before the court without a bill. (*Bookwalter* v. *Conrad, ante,* p. 62, cited.)

JUDGMENTS—*Nunc pro tunc entry.*—Refusal of the district court to order a judgment entered *nunc pro tunc* as of the date of its rendition is error where the records disclose what the judgment was, and that it had actually been rendered.

Appeal from Third Judicial District, Deer Lodge County.

PLAINTIFF'S motion for the *nunc pro tunc* entry of the judgment rendered in *Parrott* v. *Hungelburger*, 9 Mont. 526, was denied by DURFEE, J. Reversed.

Brazelton & Scharnikow, for Appellant.

I. When a judgment has been rendered in a cause it becomes the duty of the clerk to make a record entry of it in an official book kept for that purpose. (1 Black on Judgments, § 110; *Keene* v. *Welsh*, 8 Mont. 309; Code Civ. Proc., § 304, Comp. Stats.)

II. The neglect or failure of the clerk to make a proper entry of record of a judgment, or a defective or inaccurate

entry of it, will not, as between the parties, operate to invalidate the judgment. (*Gunn* v. *Plant*, 94 U. S. 664; *Craig* v. *Alcorn*, 46 Iowa, 560; *Bridges* v. *Thomas*, 50 Ga. 378.)

III. The power of courts to make entries of judgments *nunc pro tunc*, in proper cases, and in furtherance of the interests of justice, has been recognized and exercised from ancient times. This power does not depend upon statute; it is inherent. (12 Am. & Eng. Ency. of Law, 80; 1 Black on Judgments, § 126; *Chissom* v. *Barbour*, 100 Ind. 1; *McDowell* v. *McDowell*, 92 N. C. 227.)

IV. It is competent for a court to enter judgment *nunc pro tunc*, at *any subsequent term*, both parties appearing and being heard. (Freeman on Judgments, § 71; *Shephard* v. *Brenton*, 20 Iowa, 41; *Murdock* v. *Ganahl*, 47 Mo. 135; *Jerrett* v. *Mahan*, 20 Nev. 89; *Burnett* v. *State*, 14 Tex. 455; 65 Am. Dec. 131.) After the lapse of the term the court retains jurisdiction of its record for the correction of clerical errors. (*Evans* v. *Fisher*, 26 Mo. App. 541.)

V. Where a court has rendered a formal judgment, but the same has not been entered on record, through neglect or misprision of the clerk, the court has power to order that such judgment be entered *nunc pro tunc* at any time. (12 Am. & Eng. Ency. of Law, 81; 3 Estee's Pleadings, § 4758; 1 Black on Judgments, § 130; Freeman on Judgments, § 61; *Harvey* v. *Whitlatch*, 1 Mont. 713; *Comanche Mining Co.* v. *Rumley*, 1 Mont. 205; *Territory* v. *Clayton*, 8 Mont. 17; *Marshall* v. *Taylor*, 97 Cal. 422; *Dreyfuss* v. *Tompkins*, 67 Cal. 339; *Franklin* v. *Merida*, 50 Cal. 289; *Rousset* v. *Boyle*, 45 Cal. 64; *Swain* v. *Naglee*, 19 Cal. 127, and note; *Gibson* v. *Chouteau*, 45 Mo. 171; 100 Am. Dec. 366; *Howell* v. *Morlan*, 78 Ill. 162; *Chichester* v. *Cande*, 3 Cow. 39; 15 Am. Dec. 238.)

VI. The decisions of the courts uniformly hold that if the records of the court show that a judgment has been formally rendered, and what such judgment was, that no other evidence is required upon which to base an order to have such judgment entered *nunc pro tunc*. (1 Black on Judgments, § 135, and cases cited; *Keene* v. *Welsh*, 8 Mont. 309; *Barber* v. *Briscoe*, 9 Mont. 345; *Belkin* v. *Rhodes*, 76 Mo. 643; *Groner* v. *Smith*, 49 Mo. 318.)

VII. The court may enter judgment as of the time when it ought to have been entered, although a considerable time has elapsed, and the death of the defendant occurring in the mean time. (5 Am. & Eng. Ency. of Law, 135; 12 Am. & Eng. Ency. of Law, 80; *Borer* v. *Chapman*, 119 U. S. 588; *Mitchell* v. *Overman*, 103 U. S. 62; *Mitchell* v. *Schoonover*, 16 Or. 211; 8 Am. St. Rep. 282; *Long* v. *Stafford*, 103 N. Y. 274; *Murray* v. *Cooper*, 6 Serg. & R. 126; *Black* v. *Shaw*, 20 Cal. 68; *Wilson* v. *Myers*, 4 Hawks, 73; 15 Am. Dec. 511; *Mays* v. *Hassell*, 4 Stew. & P. 222; 24 Am. Dec. 750.)

F. W. Cole, for Respondent.

DE WITT, J.—A motion was made in this case to strike out a large portion of the record, called a "bill of exceptions," on two grounds: 1. That D. M. Durfee, who signed the bill of exceptions, was not, at the time he signed it (January 5, 1893), a judge of the court; and 2. It does not appear that the bill of exceptions was served on respondent's attorneys, or that they had notice of the same.

While we have judicial knowledge of the fact that Judge Durfee's term of office expired on the last day of December, 1892, still, in the record, we find him acting as judge, in signing a bill of exceptions, on January 5, 1893; and, for all that appears, he could have been holding over until his successor qualified. (Const., art. 8, § 12.) But this matter is not important, nor is the objection that the bill of exceptions was not served on counsel. The matters included in the bill of exceptions are before us without a bill. The appeal is from an order. Section 438 of the Code of Civil Procedure provides: "On appeal . . . . from an order, the appellant shall furnish the court with copy of the notice of appeal, undertaking or undertakings on appeal, the judgment or order appealed from, and a copy of the papers used on the hearing in the court below, such copies to be certified in like manner to be correct."

These papers are in the record, and certified by the clerk to be correct. That is sufficient to present them to us for review. The motion is denied. (*Bookwalter* v. *Conrad*, *ante*, p. 62.)

This is the same case as that reported under the title of *Parrott* v. *Hungelburger*, 9 Mont. 526. The present defendant, McDevitt, is the administrator of Hungelburger—appointed, as is noted in the opinion of *Parrott* v. *Hungelburger*.

By reference to *Parrott* v. *Kane*, *ante*, p. 23, it will be seen that it was claimed that judgment in this case was not entered, although it was duly rendered. Writ of restitution herein was issued, and was then recalled and quashed by the court. Then plaintiff moved the court to order the clerk to enter judgment *nunc pro tunc* as of October 30, 1888. For a fuller statement of the facts, see *Parrott* v. *Kane*, *supra*. The motion was made upon all of the records and proceedings in the case. The district court, on the motion, was most amply informed by the records that judgment had been rendered in *Parrott* v. *Hungelburger*, 9 Mont. 526. It had before it the written and duly filed opinion of the district judge, giving his reasons for rendering judgment, and concluding with the following language: "The judgment of the court, therefore, is that plaintiff have possession of said premises, and recover from defendant the sum of thirty dollars per month, for issues and profits thereof, since the —— day of ——, 188—, with judgment for costs. S. DE WOLFE, Judge. Filed October 29, 1888."

The district court had also before it, upon the motion, the minutes of the court in the case of *Parrott* v. *Hungelburger*, 9 Mont. 526, of October 29, 1888, as follows: "This cause coming on again this day, the court gives judgment for plaintiff, and against defendant, according to the prayer of plaintiff's complaint, and judgment is ordered entered." The district court also had before it a judgment, duly and formally written out, giving judgment for the plaintiff, and signed by the district judge, and marked by the clerk "Filed and entered October 30, 1888." Such was the showing by the records that the judgment had actually been rendered, and what the judgment was. On this showing the district court refused to order the clerk to enter judgment *nunc pro tunc*. The court may, at a subsequent term, order a judgment entered which has theretofore been rendered, and where the records of the court show what the judgment was, and that it had actually been rendered. (*Harvey* v. *Whitlatch*, 1 Mont. 713; *Comanche*

Mining Co. v. *Rumley*, 1 Mont. 205; *Territory* v. *Clayton*, 8 Mont. 1; *Keene* v. *Welsh*, 8 Mont. 305; *Barber* v. *Briscoe*, 9 Mont. 341; 1 Black on Judgments, § 135, and cases cited. See, also, appellant's brief upon this point.)

Why the district court refused to order the judgment entered *nunc pro tunc* does not appear by the record, nor can the widest excursion into the field of surmise discover a reason for this decision. The order should have been made, as decided in the cases above cited.

The plaintiff is left in a most unusual position for a successful litigant. He obtained a judgment. On defendant's appeal he obtained an affirmance. It has never been questioned that he has a judgment. But the court quashed his writ of restitution—whether rightfully or wrongfully is not now before us for a review. The court stayed any further issuance of a writ of restitution. These proceedings by the court were upon the ground that judgment had not been entered. Then the court refused to order the judgment entered. A wholly valueless judgment is this. The plaintiff achieved a Pyrrhic victory—such a one as would lead him to exclaim with the king of Epirus, "Another such a victory, and I am lost." The law cannot contemplate such results.

The order of the district court is reversed, and the case is remanded, with directions to that court to order judgment to be entered as the same was rendered. *Remittitur* forthwith.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

BRAITHWAITE, APPELLANT, v. HARVEY, RESPONDENT.

[Submitted February 19, 1894. Decided March 19, 1894.]

ADMINISTRATORS—*Foreign judgment—Pleading.*—A judgment recovered against an administrator in another state is of no binding effect as against an administrator of the same intestate in this state, nor is it evidence of a debt, and therefore cannot be pleaded as a part of plaintiff's cause of action in a subsequent suit on the same demand against the administrator appointed in this state. Nor is it necessary to plead such judgment in order to show that the demand sued on in this state had been given credit for a sum realized under the foreign judgment.

SAME—*Extraterritorial authority—Estoppel.*—An administrator has no authority to act or bind the estate outside the jurisdiction of his own state, and, therefore, where he has defended a suit in another state in the name of the administrator appointed in that state, he is not estopped from disputing the claim upon which the action was brought when sued thereon in his own state.

STATUTE OF LIMITATIONS—*New promise.*—Letters from the defendant to a third person in which he referred to plaintiff's claim, saying: "If I do not hear from you soon I will tender amount due . . . . whatever is due is ready . . . . whenever I can safely pay you or plaintiff. I am not satisfied about the settlement. . . . . Please write me your understanding of it"; also, "if I settle with your folks, if they will see me clear of plaintiff," contain no definite, unqualified acknowledgment of plaintiff's demand or promise to pay the same, and are, therefore, insufficient to remove the bar of the statute of limitations.

Appeal from Seventh Judicial District, Custer County.

ACTION against an administrator. Judgment was rendered for the defendant below by MILBURN, J. Affirmed.

George W. Newton, and *Middleton & Light*, for Appellant.

The facts alleged in paragraph 2 of plaintiff's complaint, in connection with all the facts set forth in the other allegations of the complaint, work an estoppel against the defendant in this action, and against the estate of Leighton, to the extent that this defendant as administrator is not now at liberty to question the balance presented to him for allowance by the plaintiff against the estate of the said Leighton, as a true balance due and unpaid upon the contract in question. The facts set forth in paragraph 21, in connection with other facts alleged in the complaint, estopped the defendant from interposing the technical defense of the statute of limitations. The defendant has had his day in court upon the claim in question. "Neither the benefit of judgment on one side, nor the obligation on the

other, are limited exclusively to the parties and their privies." (Freeman on Judgments, 3d ed., §§ 174, 175.) "A party who actually appears and defends in the name of another is bound by the judgment." (*Montgomery* v. *Vickery*, 110 Ind. 211; *Valentine* v. *Mahoney*, 37 Cal. 389; Freeman on Judgments, § 163 *a*.) "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by a party, is bound by the judgment rendered therein." (*Stoddard* v. *Thompson*, 31 Iowa, 81; *Elliott* v. *Hayden*, 104 Mass. 180; *Train* v. *Gold*, 5 Pick. 380; *Jackson* v. *Griswold*, 4 Hill, 522; *Palmer* v. *Hayes*, 112 Ind. 289; *Burns* v. *Gavin*, 118 Ind. 320; *Roby* v. *Eggers*, 130 Ind. 415; *De Metton* v. *De Mello*, 12 East, 234; *Cromwell* v. *County of Sac*, 94 U. S. 351.) An administrator, wherever appointed, is in privity with the intestate, but there is, ordinarily, no privity in law or estate between administrators appointed in different sovereignties, and a judgment against one is not a bar against the other. (*Hill* v. *Tucker*, 13 How. 466, 467.) They are deemed to stand like other persons not privies in blood, privies in law or privies by estate. The facts alleged against the administrator of Leighton's domicile, *i. e.*, the defendant, bring him into such relation to the judgment rendered in North Dakota against the ancillary administrator appointed there, as to estop the defendant from saying that it was not correct or that the amount therein adjudged to be due is barred by the statute of limitations *i. e.*, the facts alleged in the complaint in this action as a whole constitute a cause of action based upon the contract of November 3, 1880, and an equitable estoppel against the defendant as to all defenses existing prior to its rendition, either under the laws of North Dakota or Montana. The ancillary administration is subsidiary and supplemental to the domiciliary administration. If assets of the estate abroad come to the knowledge of the principal administrator, and an ancillary administration becomes needful or prudent, the principal administrator should procure his own or another's appointment, and will be held responsible for due diligence and fidelity. (Schouler on Executors and Administrators, § 175.) In the very nature of things, to the extent of the powers and duties of the ancillary administrator they almost interlace, though

the domiciliary administrator has the greater powers and duties. Thus, the principal administrator may receive payment from a debtor outside of the sovereignty from which he receives his appointment, and it will be upheld even against an administrator appointed where the debtor resides. (*Wilkins* v. *Ellett*, 9 Wall. 740.) Where there are creditors, however, within the jurisdiction of the ancillary administrator, they have a legal right to insist that all assets therein be there administered and distributed. The rule is founded upon the policy of the state to protect the interests of its home creditors. (*Wilkins* v. *Ellett*, 9 Wall. 740.) After the payment of the home creditors, the residuum is to be transmitted to and distributed at the place of domicile (*Wilkins* v. *Ellett*, 9 Wall. 740), unless for some special reason, as to charge the security for faithful administration in the ancillary administration, equity would require its retention there. (*Porter* v. *Heydock*, 6 Vt. 374; *Jennison* v. *Hapgood*, 10 Pick. 77; *Parsons* v. *Lyman*, 20 N. Y. 103; *Stokely's Estate*, 19 Pa. St. 476.) An ancillary administrator cannot recover in an action against a debtor of the intestate not resident in the jurisdiction in which he acts, even though no other administrator has been appointed (*Abbott* v. *Coburn*, 28 Vt. 663, 67 Am. Dec. 735), but an administrator appointed in the jurisdiction of the decedent's domicile may maintain an action against any debtor of his intestate wherever resident, when found within the jurisdiction of his appointment. An administrator of the intestate's domicile may appoint an attorney or agent to receive and discharge a debt due to his intestate in any jurisdiction, certainly, where there are no local creditors requiring ancillary administration. (*United States* v. *Coxe*, 18 How. 100.) Except as the ancillary administration conserves the interest of "home creditors" it is subsidiary to the principal administration. They are, in law even, very close to each other; the domiciliary administrator, in a way, being the superior of the ancillary administrator by virtue of his interest in the residuum of the estate. However, the law does not hold them in privity any more than it does other persons who are not privies in blood, privies in law, or privies by estate. But we have shown other persons may, by their acts, so connect themselves that both are bound by a

judgment against one. To the person thus bound and not a party to the action the judgment stands as an equitable estoppel. Though a volunteer he has submitted the matter involved to an adjudication in the name of another. Such is the case at bar. The court erred in striking out paragraph twenty-two of plaintiff's complaint, in this, that defendant alleges acknowledgments showing a continuing contract and new promises in writing. If these new promises, admissions, and acknowledgments were sufficiently specific, although made to a third person or to a stranger, and it appears that they were intended to be communicated, they toll the statute, and for that reason are material allegations. Section 53 of the Code of Civil Procedure, provides: "No acknowledgment shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this act, unless the same is contained in some writing signed by the parties to be charged thereby, but this act shall not alter the effect of any payment of principal or interest." An acknowledgment of indebtedness made by a debtor to a stranger with the intent that it shall be communicated to and influence the creditor, is as effectual to defeat the statute of limitations as if made to the creditor or his authorized agent. (*De Freest* v. *Warner*, 98 N. Y. 217; 50 Am. Rep. 657.) It is alleged that said promise and acknowledgment were made in relation to the claim in question in this action, that it was made to J. D. Biggert, who is alleged to have been acting on behalf of persons interested in the said claim, viz: the intervenors. Braithwaite was also interested in the claim; he could maintain the action in his own name for the benefit of himself and the intervenors as the party with whom and in whose name the contract was made for the benefit of another, the trustee of an express trust. (*Braithwaite* v. *Power*, 1 N. Dak. 455, and cases cited; Code Civ. Proc. § 6.) The law would presume that an acknowledgment made to the agent of the parties in interest, or any of them, was intended to be communicated. In the case at bar the acknowledgments were communicated. They tolled the statute of limitations. The allegations contained in the twenty-second paragraph of the complaint are plenary evidence of acknowledgments and new promises, and they present material facts to be submitted to the jury.

Whether new promises related to the debt in question is for the jury, and no evidence is to be rejected on that issue. (*Cook* v. *Martin*, 29 Conn. 63; *Buckingham* v. *Smith*, 23 Conn. 453; *Shipley* v. *Shilling*, 66 Md. 558; *McCormick* v. *Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Farrell* v. *Palmer*, 36 Cal. 187; *Schmidt* v. *Pfau*, 114 Ill. 494; *Porter* v. *Elam*, 25 Cal. 292; 85 Am. Dec. 132.)

Strevell & Porter, for Respondent.

I. A judgment rendered in a foreign state or jurisdiction against an administrator in such foreign state or jurisdiction is utterly without validity or effect as a claim against an administrator of the estate of the same deceased person in this state. In such case there is neither privity of law nor estate. This doctrine has been so often and so unrelentingly held that but few leading cases need be cited to sustain it here. (*Stacy* v. *Thrasher*, 6 How. 44; *Aspden* v. *Nixon*, 4 How. 467; Freeman on Judgments, 3d ed., § 163; *McLean* v. *Meek*, 18 How. 16; *Stacy* v. *Thrasher*, 6 How. 44; *Brodie* v. *Bickley*, 2 Rawle, 431; Story's Conflict of Laws, 739.)

II. But the appellant says the defendant in this action appeared in the court in North Dakota, employed counsel and did other things, and is therefore estopped to deny that a judgment rendered against a foreign administrator is valid against another administrator in this state. To this point the appellant cites a number of authorities which are no doubt correct law in cases to which they apply, but they have not the remotest application to the case at hand. It is no doubt true that in some cases parties in direct privity may bind themselves by contesting in litigation where they are not directly parties, but that is not this case. (*Stacy* v. *Thrasher*, 6 How. 44; *Johnson* v. *Powers*, 139 U. S. 157.) It is urged by appellant that by defending in the suit in Dakota, this administrator and defendant in this case validated a judgment in a foreign jurisdiction so as to make it binding as evidence of debt against assets of the deceased in this state. So far from that position having a semblance of authority to sustain it, it will be observed in the case last cited the supreme court says such judgment has no validity as evidence of debt, even though the judgment

be against the same administrator who is sought to be charged in a jurisdiction foreign to the one where the judgment was rendered. If this judgment had been given in the state of North Dakota, in favor of the plaintiff in this action and against this identical defendant as administrator, it would have had no validity to bind the estate of the deceased in this state. With how little show of reason can it be urged then that any acts of the defendant in defending a suit in a foreign jurisdiction would bind the assets of the deceased in this state. It would not have that effect if the judgment had been against this defendant instead of one having no privity with him. In dissenting from the majority opinion in *Johnson* v. *Powers*, 139 U. S., Justice Brown, at page 164, says: "It is true that these proceedings are not binding upon others than parties and privies, and if this were an action against the administrator of the same estate in the state of New York, it is conceded at once that under the case of *Stacy* v. *Thrasher*, 6 How. 44, the action would not lie." (See, also, Wœrner's American Law of Administration, 360.)

III. Appellant discusses at considerable length in his brief the relations of ancillary or auxiliary administration to administration at the domicile. Suppose we should admit that auxiliary and domiciliary administration are the same; suppose we should go still further and admit that a judgment actually existed in favor of plaintiff and against this defendant as administrator, in a foreign jurisdiction, would such admissions confer validity upon such judgment to affect assets of the deceased in this jurisdiction? There is not an authority to be found, so far as we know, that such would be the effect of his judgment.

IV. But the appellant avers that he had alleged facts in his complaint sufficient to show that "Mr. Leighton in his lifetime admitted the indebtedness and acknowledged his liability thereunder." Suppose again we should admit that as a fact, which is not true, but if it were, that would not release a statute of bar. Where is the actual unqualified promise to pay which must always exist to waive the statute? In the letters signed by Mr. Leighton in his lifetime there is scarcely sufficient to make even a shadow of approach to the legal require-

ment to take a barred claim from under the statute of bar. Of course appellant can say the contrary in his complaint, but when he presents, as he must present, the identical promise upon which he relies, the court will judge the matter from that, and not from the mere assertion of the pleader. What is pleaded falsely, either as to fact or inference, can never be well pleaded. It will be remembered that at the time these alleged promises were made by the deceased an action was pending in the court in North Dakota against him and the two Powers and one Akin. "A new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it at the time acted upon and acceded to by the creditor." (*Wachter* v. *Albee*, 80 Ill. 47.) Did these parties or any one of them at the time act upon this pretended promise, abate the suit, or accept any promise or change their conduct to the extent of one hair? Did the promise fix any amount due or even intimate any amount which was due to any one? The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay. (*McCormick* v. *Brown*, 36 Cal. 185; 95 Am. Dec. 170; *Biddel* v. *Brizzolara*, 64 Cal. 355; *Bell* v. *Morrison*, 1 Pet. 351.)

V. And finally, what right has this plaintiff to maintain this action? Our statute in its very inception provides that "every action shall be prosecuted in the names of the real party in interest except as otherwise provided in the act itself." (Code Civ. Proc., § 4.) But appellant alleges Braithwaite is trustee of an express trust and is therefore entitled under section 6 of the same code to bring this action. Braithwaite's right to maintain the former suit it seems was challenged in a foreign state. Under the contract which was set up between the intervenors and Braithwaite, the court decided that he was a trustee and therefore, under a statute not dissimilar to ours, could maintain the action as such trustee. But all that, and whatever there was in the account or contract was merged into the judgment which was recovered in that action. (*Sessions* v. *Johnson*, 95 U. S. 347.) We are aware of cases which hold

that a creditor of a copartnership may proceed against the assets of a deceased partner without exhausting his resources against the surviving partners, but we are not aware of any case which holds that where a judgment was taken in a joint action, as in this case, the whole amount can be claimed from a deceased obligor's estate, and the other judgment debtors be passed by.

PEMBERTON, C. J.—Through this action plaintiff seeks to recover judgment against Phillip Harvey, administrator of Joseph Leighton, deceased, on a demand for the payment of five thousand five hundred and thirty-five dollars and ninety-three cents, and interest, arising on a contract hereinafter referred to. The claim was presented to, and disallowed by, the administrator of the decedent. This action was then brought in the district court thereon. The questions involved in this appeal arise on the action of the trial court in striking from the complaint portions thereof, on motion of defendant, and thereafter sustaining demurrer interposed to the complaint, on the ground that it shows no sufficient facts to constitute a cause of action, because it appears on the face thereof that the cause of action is barred by the statute of limitations.

It appears that in 1880 a contract for the transportation of certain freight from Bismarck, Dakota, via the Missouri river by boat to Fort Buford, was made between plaintiff, as transporter, and decedent and several others, as consignors. The contract was made and evidenced by the following letter:

"BISMARCK, D. T., Nov. 3, 1880.

"*Capt. Wm. Braithwaite, Steamer 'Eclipse.'*

"DEAR SIR: On your accepting this proposition, will agree to give you one dollar and seventy-five cents ($1.75) per one hundred pounds, from Bismarck to Fort Buford, on freight up to the amount of one hundred tons, and on all over and above one hundred tons, one dollar and fifty cents ($1.50) per one hundred pounds. Receipts to be equal to 100 tons to Buford. Freight to be paid on receipt of bills of lading by draft at ten days' sight on Jos. Leighton, St. Paul.

"Yours, etc. J. C. BARR,

"Agt. for H. C. Akin, Jos. Leighton & Benton Line."

The freight mentioned was transported, as appears, with some delays and other incidents in relation to the fulfillment of the contract, which are not necessary to recite in this determination, and thereby the claim for the enforcement of which this suit is prosecuted accrued in said year.

The complaint not only pleads this contract, but alleges that on the twelfth day of November, 1887, this plaintiff instituted a suit in the district court of the then territory of Dakota, in and for the county of Burleigh, now in the state of North Dakota, against Joseph Leighton, and several other parties alleged to be interested with him, to recover the amount alleged to be due plaintiff thereon. This suit was by attachment, and the property of Joseph Leighton in said territory at the time was seized thereunder. All the proceedings in said suit, and the history thereof, are set out in the complaint, or referred to as exhibits, and made part thereof, including the judgment of the district court, and the appeal therefrom to the supreme court of said territory, and the judgment of said supreme court. In these allegations the death of Joseph Leighton is shown to have occurred on the second day of September, 1888, at Custer county, in the state of Montana, where he resided. Joseph Leighton was never personally served with process in the Dakota suit. After his death one Harvey Harris was appointed administrator of his estate in Dakota territory, and appeared as such, and defended such suit. It seems, too, that, pending said suit in Dakota, certain other parties were permitted to intervene therein. These matters are particularly set out in paragraphs 17, 19, 20, 21, 22, and 23 of the complaint, and are as follows:

"17. That thereafter, on or about the eleventh day of February, 1889, one Harvey Harris, of said Burleigh county, was duly appointed administrator of the estate of said Joseph Leighton, deceased, by the then probate court of said Burleigh county, territory of Dakota, the same being a court of general jurisdiction in probate matters, and having and possessing jurisdiction for the appointment of the said Harris, as hereinbefore shown; that, after qualifying under said appointment, in accordance with the laws of the then territory of Dakota, now state of North Dakota, the said Harris entered

upon the discharge of his duties as such administrator of the estate of said Joseph Leighton, deceased, in said Burleigh county and territory, and continued in the discharge of said duties as such administrator, until the said estate in said Burleigh county, then territory of Dakota, now state of North Dakota, was fully administered."

"19. That thereafter, on or about the fifteenth day of March, 1889, by stipulation, a copy of which is hereto attached and referred to, and found upon page 46 of Exhibit '1,' and by an order of said district court, in which said action was pending, a copy of which order is hereto attached and referred to, and found upon pages 47 and 48 of Exhibit '1,' hereto attached, said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, came into said court, and entered his appearance in said action, and as a party defendant therein, and as the administrator and successor of the said Joseph Leighton, deceased, and that said action was revived and continued against said Harris, as said administrator, and thereafter proceeded with said Harris as said administrator of said Joseph Leighton, deceased, as a party defendant.

"20. That on or about the twenty-third day of February, 1889, William Rea and George F. Robinson, copartners as Robinson, Rea & Co., J. C. Kay and Woodruff McKnight, copartners as Kay, McKnight & Co., A. W. Cadman as A. W. Cadman & Co., and Joseph McC. Biggert, applied to said court to intervene in said action, and by said court were permitted so to do, and so did, and thereafter said action proceeded with said intervenors as parties thereto; and that a copy of the order of said court permitting said intervention is hereto attached and referred to, and found on pages 51 to 62 of Exhibit '1,' hereto attached; and said intervenors served and filed their complaint in intervention in said action, and a copy of the same is hereto attached, and referred to and found upon pages 53 to 60 of said Exhibit '1,' hereto attached, and that thereafter, on or about the twenty-second day of March, 1889, the plaintiff served and filed his answer to said intervenors' complaint, and a copy of the same is hereto attached, and referred to, and made a part hereof, and found upon pages 61 to 66 of Exhibit '1,' hereto attached.

"21. That the defendant herein, as the general administrator of the estate of said Joseph Leighton, deceased, immediately upon his appointment and qualification as such, as hereinbefore shown, was notified of the pendency of said action in said Burleigh county, territory of Dakota, now state of North Dakota, and of the plaintiff's claim therein, and thereafter said action proceeded to trial in said district court, and the defendant herein the same contested and defended in the name of said Harvey Harris as administrator, as hereinbefore shown, and therefore invoked the jurisdiction and determination of said court, employed counsel, produced evidence, and the issues of said contest and defense prosecuted to a final determination; and such proceedings were had in said action from time to time by the direction and co-operation of the defendant herein, that on the twenty-eighth day of August, 1891, final judgment was rendered and entered in said action, in favor of the plaintiff and the said intervenors, and against the defendant Harvey Harris, as administrator of the estate of said Joseph Leighton, deceased, to be paid in due course of administration, and the other defendants in said action, except Akin, for the sum of seven thousand three hundred and thirty-five dollars and eighty-five cents, and for certain costs of said action, amounting to the sum of two hundred and fifty dollars and thirty-six cents, and that said judgment is in full force and unreversed, and that a copy thereof is hereto attached, and referred to as, and made a part of, this allegation, and found upon pages 73 and 89 of Exhibit '1,' hereto attached.

"22. That the said Joseph Leighton, in his lifetime, in writing, signed by him, the said Joseph Leighton, and on the twenty-first day of July, 1888, acknowledged the said indebtedness under the said contract for the work, labor, and service performed under and by virtue of said contract of affreightment by this plaintiff, as aforesaid, which acknowledgment was in words and figures as follows, that is to say:

"'Joseph Leighton, "'President. E. B. Weirick, Cashier.

"'W. B. Jordan, "'Vice Pres't. H. B. Wiley, Asst. Cashier.

"'2,752 FIRST NATIONAL BANK.

"'Capital.....$50,000

"'Surplus and undivided profits..... 65,000

"'MILES CITY, Montana, 7/21, 1888.

"'*J. D. Biggert, Pittsburg,*

"'DEAR SIR: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay either you or Braithwaite. Yours truly, J. LEIGHTON.'

"That the sum owing to plaintiff, as shown by the allegations hereinbefore contained, was the amount, and not otherwise, referred to in said letter; and the Braithwaite mentioned therein is this plaintiff, and none other; and the said J. D. Biggert, claiming to act and acting on behalf of said intervenors, was not a stranger to the transaction. That on divers and sundry times the said Joseph Leighton acknowledged said indebtedness, to wit, on the twenty-seventh day of June, 1888, on the twenty-second day of July, 1888, and on the fifth day of August, 1888, as will more fully appear from pages 74 to 77 of Exhibit '1,' hereto annexed, and made a part hereof. That again, on the first day of August, 1888, the said Joseph Leighton, by one George T. Webster, his attorney, duly authorized so to do, acknowledged under oath the making of the contract of affreightment hereinbefore mentioned, and the voyage, as will more fully appear from pages 42 to 45 of said Exhibit '1,' hereto annexed, and made and referred to as a part hereof.

"23. That there has been paid plaintiff, and applied in liquidation of a part of the amount so due plaintiff, as aforesaid, from the said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, the sum of four hundred and thirteen and 92-100 (413.92) dollars, said payment being made on the thirty-first day of March, 1892. That theretofore, and the twenty-eighth day of November, 1891, there was paid on account of said indebtedness owing to this plaintiff the further sum of two thousand dollars ($2,000), which sum was paid for and in behalf of the said Joseph Leighton by Kelly & Jordan, who had heretofore obligated themselves to pay the same for and in behalf of the said Joseph Leighton. And that the estate of the said deceased in the territory of Dakota, now state of North Dakota, has been fully administered upon, settled, and exhausted, and said administrator's final accounts

presented to the county court in and for said Burleigh county, state of North Dakota, the same having exclusive jurisdiction therein, and by said court passed, allowed, and approved, and said administrator discharged from said trust, and that a copy of the order of said county court passing, allowing, and approving said final account is hereto attached, and referred to and made a part hereof, and found on pages 92 to 94 of Exhibit '1,' hereto attached."

On motion of the defendant the court struck these paragraphs from the complaint, on the ground that they were irrelevant and redundant. This action of the court is assigned as error. To determine this question it is necessary to determine the force and effect of a judgment against an administrator in one state against an administrator of the same estate in another state.

In *Johnson* v. *Powers*, 139 U. S. 156, this subject is thoroughly discussed, and the authorities are collected and cited. In this case Mr. Justice Gray, delivering the opinion of the court, says:

"A judgment *in rem* binds only the property within the control of the court which rendered it, and a judgment *in personam* binds only the parties to that judgment and those in privity with them.

"A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the deceased." (*Aspden* v. *Nixon*, 4 How. 467; *Stacy* v. *Thrasher*, 6 How. 44; *McLean* v. *Meek*, 18 How. 16; *Low* v. *Bartlett*, 8 Allen, 259.)

In *Stacy* v. *Thrasher*, 6 How. 44, in which a judgment, recovered in one state against an administrator appointed in that state, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the circuit court of the United States held within another state against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from:

"The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction." *Stacy* v. *Thrasher*, 6 How. 53.

In answering the objection that to apply these principles to a judgment obtained in another state of the union would be to deny it the faith and credit, and the effect, to which it was entitled by the constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject matter when the proceeding was *in rem;* and that the parties to the judgments in question were not the same; neither were their privies, in blood, in law, or by estate; and proceeded as follows:

"An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts." (*Stacy* v. *Thrasher*, 6 How. 59, 60.)

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But

that is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot even be *prima facie* evidence of a debt, for, if it have any effect at all, it must be as a judgment, and operate by way of estoppel." (*Stacy* v. *Thrasher*, 6 How. 60, 61.)

In *Low* v. *Bartlett*, 8 Allen, 259, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: 'The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor.' (8 Allen, 266.)

If the judgment recovered in Dakota against the administrator there is of no binding force and effect, not even effectual as evidence of a debt, against the administrator in this state, as is held by the authority just quoted, then the pleading of the same, as is done in this case, could subserve no valuable purpose, and it cannot be properly contended that the court erred in striking the same, and all reference thereto, from the complaint. Appellant contends that it was necessary to plead such judgment and proceedings in order to show that the demand sued on here had been given credit for the amount realized under the Dakota judgment. We think this position untenable. Such credit could have been given in any suit on the demand in litigation.

The appellant further contends that it was necessary to plead the Dakota judgment and proceedings, in order to show that

the Montana administrator, the defendant here is estopped from disputing the claim sued on by reason of his having taken part, as alleged in paragraph 21, stricken from the complaint, in defending said Dakota suit in the name of Harvey Harris, administrator there. We think this contention cannot be maintained. There was no privity between these two administrators. This defendant had no authority to act or bind the estate outside of the jurisdiction of his own state or appointment." (See *Johnson* v. *Powers*, 139 U. S. 156, and authorities cited therein. 1 Wœrner's American Law of Administration, § 160, p. 362.)

Appellant contends that, whatever force and effect the court might give the Dakota judgment and proceedings set out in the complaint, and the action of the court therein, still he has a cause of action independent thereof, by reason of the alleged new promise in writing of Leighton in his lifetime, pleaded in paragraph 22 of the complaint, which was stricken out by the court. After striking out said parts of the complaint, the court sustained defendant's demurrer thereto on the ground that the demand sued on was barred by the statute of limitations. This action of the court is especially attacked and complained of by appellant, as he says the court, by striking out paragraph 22 of the complaint, left the same demurrable, as said paragraph set up, as claimed, a new promise, made by Leighton in his lifetime, to pay the demand sued on. While, perhaps, it would have been more appropriate to attack this particular paragraph of the complaint by demurrer, yet whether prejudicial error was committed by the court in its action we will consider later on. Does paragraph 22 of the complaint contain and plead such a new promise to pay the demand sued on as will relieve it from the bar of the statute of limitations? It is conceded that the demand is barred unless the bar is removed by the new promise of Leighton in his lifetime, set out in said paragraph 22. We will consider this question as if said paragraph had not been stricken from the complaint. The written new promise of Leighton relied on to remove the bar of the statute of limitations in this case is as follows:

"MILES CITY, Montana, 7/21, 1888.

"*J. D. Biggert, Pittsburg,*

"DEAR SIR: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last 7 years, whenever I can safely pay either you or Braithwaite. Yours truly,

"J. LEIGHTON."

The appellant relies on two other written instruments, signed by said Leighton, to relieve this demand from the bar of said statute. These instruments are as follows:

"MILES CITY, Montana, 6/27, 1888.

"*John Biggert, Pittsburg,*

"DEAR SIR: Have just returned, and have been looking over matters. I am not satisfied about the settlement of *Eclipse* trip. Please write me your understanding of it. Also, if I settle with your folks, if they will see me clear of Braithwaite, &c. Write me at once. Yours truly,

"J. LEIGHTON."

"MILES CITY, Montana, 7/22, 1888.

"*J. D. Biggert, Pittsburg,*

"DEAR SIR: Yours, with check, at hand. I am anxious to see Joe better. He came out and figured up books, and saw that we had a loss for 1, and went away satisfied, but we will write him after I get his letter. I cannot wait long for your decision. You know I am very ill, and I must have this thing off my hands. I want to help you in the matter, but the suit has got to be attended to. Very truly,

"J. LEIGHTON.

"Why don't you write me about your letter of April, '82?"

These last two instruments are referred to as exhibits, and the first instrument is set out in full in said paragraph 22. Said first written instrument or letter is especially relied on by appellant as constituting such an acknowledgment of the demand sued on, and new promise to pay the same, as to take the debt out of the operation of the statute of limitations.

In *Bell* v. *Morrison*, 1 Pet. 352, a case involving the doctrine under discussion, Mr. Justice Story, speaking for the

court, says: "To remove the bar of the statute of limitations by a new promise it must be determinate and unequivocal; and, if the new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay."

In *Biddell* v. *Brizzolara*, 56 Cal. 382, the court say: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be *accompanying circumstances* which *repel* the promise or intention to pay; if the expressions be equivocal, vague, and undeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Mr. Justice Story, *Bell* v. *Morrison*, 1 Pet. 362." "An acknowledgment of the debt to take the case out of the statute of limitations must be clear and unambiguous, and must recognize and be directed to the particular debt and amount to an unqualified admission that it is due and unpaid." (5 Gen. Dig., U. S., § 526, p. 1399, and authorities there cited.

In *McCormick* v. *Brown*, 36 Cal. 185, 95 Am. Dec. 170, the court say: "The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay."

We think it cannot be contended that the two writings claimed to be acknowledgments and new promises, dated respectively 6/27, 1888, and 7/22, 1888, and set out above, contain any such acknowledgments of this debt, or new promise to pay the same, as to relieve the demand sued on from the bar of the statute. The instrument dated 7/22, 1888, says nothing about this demand. The instrument dated 6/27, 1888, shows that Leighton is not satisfied about the settlement of the *Eclipse* trip, and asks, "If I [Leighton] settle with your folks, if they will see me clear of Braithwaite," etc. If there is any promise in this, is it not conditional? This certainly does

not come within the requirements to take it out of the operaation of the statute, even if the instruments were otherwise definite and certain, in which respect it seems fatally defective. Now, as to the first instrument or letter of Leighton, chiefly relied on to take this case out of the statute of limitations, this letter, like the others, is written to one J. D. Biggert, at Pittsburg. In this letter Leighton seems to complain of Biggert's delay. He says if he does not hear soon, he will go to Bismarck, and tender amount due, as he does not want to be bothered any more. Then he says, "Whatever is due is ready, as it has been for 7 years, whenever I can safely pay either you or Braithwaite." Now, what are the legitimate inferences to be drawn from this letter and the others? 1. That Leighton was ill, and was anxious to settle this matter in his lifetime; 2. That he was willing, and had been for seven years, te pay whatever was due from him, when the amount could be ascertained, and he should know to whom he could safely pay such amount. It is very evident that there was a dispute as to what was due, and to whom it was payable. Leighton seemed anxious to pay when these two important matters were settled. His willingness to pay was evidently conditioned upon the ascertainment of the amount due, and when he was made secure in paying either to the parties represented by Biggert or to Braithwaite. It does not appear that either of these things was ever done, or that Leighton's letter and terms therein stated were ever accepted or acted upon in any manner by plaintiff or any other party connected with this matter. These conditions should have been shown to have been performed by plaintiff before he seeks the benefit of the alleged new promise to pay. (*Bell* v. *Morrison*, 1 Pet. 351.) This is not shown to have been done. But plaintiff seems to have disregarded the terms, conditions, and overtures of settlement contained in this alleged new promise, and now, after the death of Leighton, seek to avail himself of the benefits thereof, as if such conditions were immaterial. We think no other conclusion can be fairly reached from a proper construction of all these letters and alleged new promises to pay. In none of these letters is there an unconditional, definite, certain, and unqualified acknowledgment of this demand, or any certain

demand and promise to pay the same. We are therefore of the opinion that these written instruments or letters of Leighton are insufficient to remove the bar of the statute of limitations. So holding, we see no error in the action of the court in holding the complaint bad on demurrer, or that any substantial right of appellant was prejudiced by striking said paragraph 22 from the complaint, as, in our view, the complaint did not, in any event, state facts sufficient to authorize a recovery, for the reason that the demand sued on is barred by the statute of this state.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

Affirmed.

HARWOOD and DE WITT, JJ., concur.

MUTH, RESPONDENT, v. ERWIN, APPELLANT.

[Submitted September 11, 1893. Decided March 19, 1894.]

ATTACHMENT—*Amendment to affidavit.*—It is not error for the trial court to permit an attachment plaintiff to amend his complaint and affidavit on attachment, without an affidavit showing ground therefor, and pending a motion to dissolve, where the amendment does not affect the substantial rights of the parties.

Appeal from Sixth Judicial District, Park County.

ACTION on promissory note. Defendant's motion to dissolve attachment denied by HENRY, J. Affirmed.

Campbell & Stark, for Appellant.

Savage & Day, for Respondent.

HARWOOD, J.—Respondent, as receiver of the firm of Greenhood, Bohn & Co., brought this action against defendant to enforce payment of a promissory note, and sued out an attachment writ in the action, by virtue of which it appears certain property was seized. Thereafter, motion was made by the defendant to quash the attachment on the ground that it did not appear by averment in the complaint or affidavit for

attachment, that the receiver was duly authorized by the court appointing him, to bring this action for the enforcement of said debt. Thereupon, plaintiff, by permission of court, amended the complaint and affidavit by inserting therein such averment, and thereafter the court overruled the motion to dissolve the attachment. Defendant excepted to the action of the court in allowing such amendment pending the ruling on the motion to dissolve the attachment, and overruling such motion, because the amendment had supplied the defect to which the motion was pointed. Such exception raises the only question presented on this appeal.

The ruling of the trial court, excepted to, undoubtedly conforms to the intendment of the provisions of the Code of Civil Procedure, as heretofore held by this court. (*Josephi* v. *Mady Clothing Co.*, 13 Mont. 195.) The defect amended was not one which affected the merits of the demand or defense thereto, and would scarcely need an affidavit to lay a foundation for such amendment. Moreover, an omission to require an affidavit to show ground for an amendment not affecting the substantial rights of the parties would not justify the reversal of the judgment. (Code Civ. Proc., § 119.) The order of the trial court overruling defendant's motion to dissolve the attachment and the judgment will therefore be affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

MERRITT, APPELLANT, v. McNALLY ET AL., RESPONDENTS.

[Submitted June 24, 1893. Decided March 19, 1894.]

NEGLIGENCE—*Building inspector—City ordinance.*—A city ordinance requiring a building inspector to inspect buildings in course of construction and to "see" that they are being constructed as provided by the ordinance imposes upon him the duty of enforcing from builders obedience to its requirements, and for a neglect of this duty he is liable in damages to one who sustains injury by the fall of a building constructed in a careless and grossly negligent manner.

SAME—*Pleading—Defense.*—In an action for damages against a city officer for negligence of a duty prescribed by ordinance, an objection to the complaint

that it does not show that the officer had the means of enforcing the provisions of the ordinance will not be sustained on demurrer, but the sufficiency of such want of means as a defense may be determined upon an answer.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for damages. Judgment was rendered for defendant below by HUNT, J., on demurrer. Reversed.

Statement of the case by Mr. Justice DE WITT:

This action is against the defendant McNally as building inspector, and against his sureties upon his official bond as such inspector. Separate demurrers of McNally and his sureties, respectively, were sustained. Judgment was thereupon entered for defendants, from which the plaintiff appeals. The question being whether the complaint sets forth a cause of action, it will be necessary to recite the principal points in that pleading, which are as follows: The city of Helena is a municipal corporation. This city, under the acts of the legislative assembly, has power to regulate, by ordinance, the construction of buildings within the city. The city council passed an ordinance entitled "Building," known as chapter 10 of the Ordinances of the City of Helena. The whole ordinance, which is a lengthy one, is pleaded in the complaint. Section 1 of the ordinance provides for the appointment of an inspector of buildings, who shall be a practical builder, and shall hold his office for the term of one year, etc. The defendant McNally, prior to the acts complained of in the complaint, was duly appointed building inspector, and was qualified to act as such at the time mentioned in the complaint. That ordinance further provides: "When any person or persons, or corporation, shall be desirous of erecting, repairing, changing, or altering any building, buildings, or structure within the limits of the city of Helena, he or they shall make application at the office of the building inspector for a permit for that purpose, and shall furnish said inspector with a written statement of the proposed location, dimensions, and manner of construction of the proposed building, buildings, or structure, and the materials to be used, and a plan of the plumbing, draining, and ventilation, together with plans and specifications of the proposed building, buildings, or

structure, which shall be delivered to said building inspector, and remain in his custody a sufficient length of time to allow the necessary examination to be made of the same, and, if required by the inspector, a copy of said plans and specifications shall be filed in the office of said inspector of buildings. After which, if it shall appear to said inspector that the laws and ordinances of the city are complied with, he shall give the permit asked for, upon the payment of the following prescribed fees: . . . . Blank forms for the detailed statement as herein required may be obtained at the office of the inspector of buildings for the applicants to fill out, describing location of proposed structure, number and height of stories, size of joists, and distance apart, dimensions of supporting ironwork, for what purpose the building, buildings, or structure is designed, and such other information applicable to the proposed improvement, which statement so properly filled out the owner or owners, his or their architects or agent, shall sign, with the agreement contained in said detailed statement that he or they will, in all respects, construct the work in accordance with such detailed statement, plans, and specifications, and in compliance with the laws and ordinances of the city of Helena, and it shall not be lawful to proceed to construct, alter, or repair any building, buildings, or structure within the limits of said city of Helena without such permit."

Section 4 of that ordinance further provides as follows: "The said inspector shall keep an office in the city hall, or such other place as shall be provided by the city council, where it shall be the duty of said inspector to keep a record of all permits issued, which shall be regularly numbered in the order of their issue, and also a record of the statements upon which permits are issued. He shall also keep a record of, and report to the common council, a full and complete register of the number description, and size of every building erected in the city during his term of office, of what material constructed, with the aggregates of the number, kind, and costs of all buildings, and the sanitary condition of all buildings."

Section 5 of the ordinance is as follows: "It shall be the duty of every inspector appointed under the provisions of this act to visit and inspect each and any house or houses, build-

ing or buildings which may be in the course of erection, construction, or alteration within the limits of the city, and to see that each house or houses, building or buildings are being erected, constructed, or altered according to the provisions of this ordinance, and all acts and ordinances in force in said city, and the manner adopted for the security thereof against fires, and the safety of the occupants; that the materials used are suitable for the purpose, and that the work is done in a substantial and workmanlike manner, and is of sufficient strength and solidity to answer the purpose for which it is designed, and before the foundations are laid he shall examine the trenches dug for the same, and be fully satisfied that the soil or substratum is sufficient for the structure, or, at least, the best that can be obtained, and should the nature of the soil be such, and the work of sufficient magnitude as to require piling, flagging, or lagging, the same shall be done; *provided*, that it may be deemed necessary by the inspector; that his visits and inspection shall be repeated from time to time during the erection, construction, or alteration of such house or houses, building or buildings, until the walls shall have been completed and the same inclosed, when his duties shall terminate. He shall, on application for that purpose, furnish the owner or owners, contractor or contractors, his certificate that the said house or building is, in all respects, conformable to law and properly constructed."

In later sections of the ordinance there are detailed provisions as to the strength of walls of certain heights, and for the use of various kinds of materials, which provisions need not be recited in full.

Section 57 provides as follows: "Before the erection, construction, or material alteration of any building in the city of Helena the owners, architect, or builders shall submit to the inspector of buildings full specifications and plans of the proposed construction or alteration, and a detailed statement in writing. Such statement shall give: . . . . The owner, his agent, or architect shall then sign an agreement that he will construct the work in accordance with the description as set forth in such specifications, plans, or detailed statement, and all matters and things connected with such construction or altera-

tion of any building shall be done in strict compliance with the building ordinance. Thereupon, the inspector of buildings shall issue a permit to make such construction or alteration, upon the payment of the fees hereinbefore mentioned in this article, and it shall not be lawful to proceed to construct or materially alter any building without such permit."

In section 68 we find the following: "Any person who shall violate any of the provisions of this ordinance, where no other penalty is provided, shall be subject to a fine of not less than ten dollars, nor exceeding one hundred dollars, for each and every offense."

The complaint then goes on to allege that on the 5th of August, 1891, the plaintiff was the owner of, and in possession of, certain premises within said city, describing the premises. That on or about the last of March, 1891, on premises adjoining those of plaintiff, excavations were made for a building foundation, and from that time on, up to and including said fifth day of August, 1891, a two-story building of brick and stone was in course of erection and construction.

That it was the duty of said McNally, by virtue of his office as building inspector, to see that said building was erected in accordance with the laws and ordinances relating to the construction of buildings in said city, and to visit and examine said building, and see that the walls thereof conformed to the provisions of said ordinance. That said McNally wrongfully disregarded his duty, and failed and neglected and refused to visit and inspect said building, although he well knew that it was in process of erection. That he wrongfully neglected and failed to see that said building was being constructed according to the provisions of said chapter 10, entitled "Building." And that he neglected to see that the building was being constructed in such a manner as to insure the safety of the occupants of said building, and of the plaintiff's adjoining premises.

Then follows detailed allegations of the building inspector's negligence to see that certain things were done about said building in accordance with the sections of the ordinance which have been heretofore cited fully. That, by reason of defend-

ant's negligence, the walls of the building were constructed in an unskillful, careless, and grossly negligent manner.

Then follow details showing wherein was the negligence of construction. That by reason of said negligence, on the 5th of August, 1891, the building in course of construction fell upon the dwelling-house of plaintiff, and crushed and demolished the same.

Then follow allegations of the particulars of the damage, including the destruction of furniture, the killing of plaintiff's infant child, the exposure of his wife to the inclemency of the weather, the contracting of physicians' bills, funeral expenses, etc.

The demurrers of the separate defendants were upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants.

Henri J. Haskell, and *E. L. Knowles*, for Appellant.

When one sustains an injury through the misfeasance or nonfeasance of a public officer, who acts, or omits to act, contrary to his duty, the law renders him liable in a civil action to any person thereby injured. (*Adsit* v. *Brady*, 4 Hill, 630; 40 Am. Dec. 305; *Nowell* v. *Wright*, 3 Allen, 166; 80 Am. Dec. 62; *Hover* v. *Barkhoof*, 44 N. Y. 114; *Smith* v. *Wright*, 24 Barb. 172; Shearman & Redfield on Negligence, 3d ed., § 168, p. 209, and cases cited in notes; *Bennett* v. *Whitney*, 94 N. Y. 302, 306; *Robinson* v. *Chamberlain*, 34 N. Y. 389; 90 Am. Dec. 713; *Governor* v. *Dodd*, 81 Ill. 162.) When the law defines the duties of a public officer his sureties are responsible for the faithful performance of such duties, and are liable in case of his misfeasance or nonfeasance in office. (*Smith* v. *Lovell*, 2 Mont. 332; *Maddox* v. *Rader*, 9 Mont. 126, 135; *Van Pelt* v. *Littler*, 14 Cal. 198, 199; *Forgarty* v. *Finlay*, 10 Cal. 240; 70 Am. Dec. 714; *McComb* v. *Reed*, 28 Cal. 281; 87 Am. Dec. 115; *Ziegler* v. *Commonwealth*, 12 Pa. St. 227; *Missoula County* v. *Edwards*, 3 Mont. 60; *Governor* v. *Ridgway*, 12 Ill. 19.) Section 4 of chapter 10, entitled "Building," of the Revised Ordinances of the city of Helena, page 89, is mandatory, and has a penal provision thereto attached. Section 5 of said chapter is also mandatory, and does not depend

for its construction upon the provisions of section 4. It will be seen that section 15 of chapter 7 of the Revised Ordinances of the City of Helena, page 77, is mandatory, but has no penal provision attached thereto. Section 2, page 71, of said chapter, is also mandatory. The individual cannot sue for the reason that the grievance of one is the grievance of all. Not so when the building inspector fails to do his duty, and damages thereby accrue to a citizen. The requirements of said section 4 are such that the act of erecting a building within the city limits is constructive notice to the inspector, but in this case the pleadings show that the inspector had express notice of the construction of the building, and willfully neglected to perform his duty. There is no ambiguity in this section, and the language used is simple and clear. When the meaning of the statute as it stands is clear, courts have no power to insert qualifications. (Sedgwick on Construction of Statutory and Constitutional Law, p. 326, par. 1; *Supervisors of Niagara* v. *People*, 7 Hill, 511; *Corbett* v. *Bradley*, 7 Nev. 106, 108; *Smith* v. *Williams*, 2 Mont. 198.) The power of construing a statute strictly or liberally only exists in those cases where the intent is ambiguous and the effort to arrive at it hopeless. (Sedgwick on Construction of Statutory and Constitutional Law, p. 326, par. 2; *Koch* v. *Bridges*, 45 Miss. 247; *Smith* v. *Williams*, 2 Mont. 199, 201; *Bidwell* v. *Whitaker*, 1 Mich. 469, 480.) The means of arriving at the intent are to be found in the statute itself. No extrinsic facts are to be taken into consideration. (Sedgwick on Construction of Statutory and Constitutional Law, 325, note; *Daniels* v. *Andes Ins. Co.*, 2 Mont. 78; Endlich on Interpretation of Statutes, § 431, p. 607.) Effect, if possible, must be given to every word and clause of a statute. (*Attorney General* v. *Detroit etc. Plank Road Co.*, 2 Mich. 139, 142; *Bonnet* v. *San Francisco*, 65 Cal. 231; *Ex parte Reis*, 64 Cal. 240; *Hyatt* v. *Allen*, 54 Cal. 353, 359.) Where words have a technical and a popular meaning courts will accord to them their popular meaning. (*Weill* v. *Kenfield*, 54 Cal. 111, 113; *In re Maguire*, 57 Cal. 604; 40 Am. Rep. 125; *Appeal of Houghton*, 42 Cal. 52.) The requirements of a statute can never be dispensed with as being directory when the act or omission of it can, by

any possibility work advantage or injury, however slight, to any one affected by it. (*Koch* v. *Bridges*, 45 Miss. 247; *Looney* v. *Hughes*, 30 Barb. 605, 607, 608; *People* v. *San Francisco*, 36 Cal. 603; *Hines* v. *City of Lockport*, 5 Lans. 21; *Territory* v. *Board of Commissioners*, 8 Mont. 409.) An officer acting under his oath of office and bond is required to understand thoroughly the duties, objects, and responsibilities of his office, and to at all times know and contemplate the result of a violation of his duties. So, if a party contracts with reference to a law or ordinance, the law itself becomes a part of the contract, and he is bound thereby. (*Matoon* v. *Eder*, 6 Cal. 59.) The condition of the bond is that he shall and will faithfully and impartially discharge all duties of inspector of building in the city of Helena, and that in all things he will faithfully discharge the duties of said office. Such a condition in a notary's bond is the only proper condition to be inserted. (*Tevis* v. *Randall*, 6 Cal. 632; 65 Am. Dec. 547.) Failure of a person to perform a duty imposed upon him by statute or other legal authority should always be considered evidence of negligence or something worse. (Shearman & Redfield on Negligence, §§ 13 *a*, 54 *a*, p. 69; *Siemers* v. *Eisen*, 54 Cal. 420.) Nor is the fact that the defendant contracted faithfully to perform his duties, not to the plaintiff, but to the government, any defense, for the action is founded, not on the contract, but on breach of duty. (*Henly* v. *Mayor of Lyme*, 5 Bing. 107, 109; *Farrant* v. *Barnes*, 11 Com. B., N. S., 553; *Marshall* v. *York etc. R. R. Co.*, 11 Com. B. 655; *Burnett* v. *Lynch*, 5 Barn. & C. 589, 591, 593; *Winterbottom* v. *Wright*, 10 Mees. & W. 109.) A general power, granted by charter or by the legislature, includes all incidental powers necessary to the carrying out of the general power. (*Gray* v. *City of Brooklyn*, 7 Hun, 633; *Mayor etc.* v. *Hoffman*, 29 La. Ann. 656; *City of Olympia* v. *Mann*, 1 Wash. 389; *Baumgartner* v. *Hasty*, 100 Ind. 579, 580; 50 Am. Rep. 830; *Hubbard* v. *Town of Medford*, 20 Or. 315; *Cronin* v. *People*, 82 N. Y. 318; 37 Am. Rep. 564; *Folmar* v. *Curtis*, 86 Ala. 354; 1 Dillon on Municipal Corporations, § 90, p. 148.)

Word, Smith & Word, for Respondents.

I. Nowhere does the complaint allege that an application was made or a permit granted for the construction of the building, the falling of which, it is alleged, caused the injury. The plans and specifications, which under sections 2 and 57 must be submitted to the inspector, must contain a description of the materials to be used in the proposed structure, its purpose and design, its proposed location, and the number of its stories. The performance of the duties set forth in section 5, on the part of the inspector, plainly contemplates the performance of the requirements of sections 2 and 57 on the part of the builder. In other words, the inspection of "each and every building," made necessary by section 5, embraces only those buildings for which a permit has been obtained. If this be so, there was, then, no duty resting upon the defendant officer to inspect the building mentioned in the complaint, and for his failure to act he is not liable.

II. The duty of the officer must be entire, absolute, and perfect, and he must be clothed with the ability to perform it. (*Nowell* v. *Wright*, 3 Allen, 266; 80 Am. Dec. 70; *Bartlett* v. *Crozier*, 17 Johns. 450; 8 Am. Dec. 428; *Hover* v. *Barkooff*, 44 N. Y. 113; *Weed* v. *Ballston*, 76 N. Y. 329; Shearman & Redfield on Negligence, §§ 172, 173; *Bennett* v. *Whitney*, 94 N. Y. 302; Mecham on Public Offices, § 669.)

III. The alleged omission of the inspector to act was not the proximate cause of the injury complained of. It is not enough for the plaintiff to show an injury, but he must go further and show that the injury was caused by the negligence of the defendant. (*State* v. *Harris*, 89 Ind. 363; 46 Am. Rep. 169; *Eslava* v. *Jones*, 83 Ala. 139; 3 Am. St. Rep. 699; *Loop* v. *Litchfield*, 42 N. Y. 351; 1 Am. Rep. 543; *Anthony* v. *Slaid*, 11 Met. 290; Mecham on Public Offices, §§ 676, 680, and cases.) Would an inspection by the officer in this case have averted the injury complained of? Take the case of a building which is going up under a permit issued and an agreement signed to properly construct the same. The inspector sees during his visits that the architect is not following the plans and specifications submitted. It may be that the variation is a material one; that if allowed to continue it may weaken the

building and render it unsafe. Will it be contended that the mere presence of the inspector of buildings, or his visits, however often repeated, would lessen or abate the danger? If it will not, then this officer is not liable beyond his duty to condemn the structure by refusing a certificate for the same, unless under this ordinance he had the power, and it was made his duty, to abate the defective building. The exercise of a positive power, the ability to condemn and destroy, was the remedy in such a case. Counsel for appellant seems to see in section 5, in the use of the words "visit and inspect and see" that each house and building conforms to the provisions of the building ordinance, the conferring upon the inspector such a power, but respondents contend that a comparison of section 5 with the other sections of the ordinance, and a construction of the above words in their usual and popular meaning, will lead to the conclusion that no such power was, or was intended to be, conferred. The powers of the inspector are in their nature negative. He may refuse to grant a permit in the first instance; he may refuse to issue a certificate that the building is properly constructed in the second. Nor is it anywhere in this ordinance made his duty to notify the council, or other officer or body, that a building is going up for which a permit has not issued, or that an architect is not following in the construction of a building the plans and specifications submitted. In this respect the ordinance may be said to be defective, but if so, the blame cannot fall upon the inspector. To give to section 5 the construction appellant seeks to put upon it is to render it null and void. Under the charter of the city the power to declare and condemn nuisances is vested in the city council. Even that body cannot by an ordinance or resolution make that a nuisance which is not so in fact. (1 Wood on Nuisances, §§ 744; *Hennessy* v. *City of St. Paul*, 37 Fed. Rep. 565; *Yates* v. *Milwaukee*, 10 Wall. 497.) A further reason that the construction sought to be given to section 5 must be rejected is that it is vesting in an inspector of buildings the functions of a judge, of a jury, and of a police officer. It is placing the property of the citizens of the city at the disposal of the inspector of buildings. It is delegating to this officer functions and powers given to the city by the legislature,

which the city holds in trust, and which are not subject to delegation. (15 Am. & Eng. Ency. of Law, 1043, note 1, and cases.)

IV. The duties of the inspector of buildings are known as *quasi* judicial. They are owing solely to the public. For the nonperformance of such duties there is no liability to individuals. (Mecham on Public Offices, § 673; *State* v. *Harris*, 89 Ind. 363; 46 Am. Rep. 169; Cooley on Torts, 2d ed., 444–47; 2 Thompson on Negligence, § 11, p. 822.)

DE WITT, J.—The ground on which the demurrers were sustained in the court below seems to be that, notwithstanding how great the damage may have been which the plaintiff suffered, the defendant McNally was not, by virtue of his official position or otherwise, to be held liable for these injuries. The defendant was a public officer, to wit, building inspector of the city of Helena, and in the pay of the city as such officer. The cause of action attempted to be alleged against him is that, as such officer, he acted so negligently—or perhaps it might better be said, so negligently failed to act—that the damage described in the complaint resulted. Whatever may have been the early rulings upon this point, it seems to be settled, in modern times, that where a public officer is exercising ministerial powers, and where he performs his duties negligently, or where he carelessly or willfully or knowingly fails to perform the duty at all, and from such failure on his part damage results to another, such person so damaged has a cause of action against such officer. (Throop on Public Officers, c. 29, § 724 et seq.; *Raynsford* v. *Phelps*, 43 Mich. 342; 38 Am. Rep. 189; *Hines* v. *City of Lockport*, 50 N. Y. 236; *Amy* v. *Supervisors*, 11 Wall. 136; Shearman & Redfield on Negligence, 324, and cases; *Robinson* v. *Chamberlain*, 34 N. Y. 389; *Hover* v. *Barkhoff*, 44 N. Y. 113, and review of cases; *Adsit* v. *Brady*, 4 Hill, 630; 40 Am. Dec. 305; *Bennett* v. *Whitney*, 94 N. Y. 302; *Nowell* v. *Wright*, 3 Allen, 166; 80 Am. Dec. 62; Bishop's Noncontract Law, § 796.)

It is also held that if an officer of this sort is to be liable for damages, it must appear that the duty imposed upon him was a clear and absolute one. (See cases *supra* and *infra*.)

We will therefore first inquire whether the ordinance of the city purports to impose upon the building inspector the duty with the neglect of which he is charged. At the outset we will endeavor to construe the word "see," as used in section 5. The words are, "and to see that each house or houses, building or buildings, are being erected, constructed, or altered, according to the provisions," etc. The respondent would give to this word "see" a very literal construction. In his view it would seem to mean simply to look at or to observe. On the other hand we think the word is used in the sense of "to cause to be done or accomplished." A parallel case may be observed in section 5, article VII, of the constitution of the state, which reads as follows: "The supreme executive power of the state shall be vested in the governor, who shall see that the laws are faithfully executed." We are satisfied that the word "see," in this case, does not mean simply that the governor shall stand by and look at or observe the laws being faithfully executed, but that this provision of the constitution is in the nature of a command to the governor to require the laws to be faithfully executed, whenever there is need for the interposition of the executive arm. The word "see," as used in the ordinance, is in the sense defined by the "Century Dictionary," in the fifth subdivision of definitions of that word, as follows: "To bring about as a result; superintend the execution or the performance of a thing so as to effect a specified result; make sure; with an object clause with 'that' specifying the result. 'See that ye fall not by the way.' (Gen. xiv: 24.)" We are therefore of the opinion that the use of the word "see," in this ordinance, is the laying of a duty upon the building inspector to require buildings to be erected in accordance with the provisions of the ordinance. It seems to us that any other view of the meaning of the word "see," in this connection, would be a wholly unreasonable one. Therefore, we may conclude that the duty was clearly imposed upon the building inspector to "see" or to require that the building in question was properly erected.

The allegations of the complaint that the building was not properly erected, in accordance with the ordinance, are perfectly clear; also, the allegations are clear that the inspector did not see that the building was properly erected. Respondents here

interpose the suggestion that, even if a duty is imposed upon a public officer, he is not liable for its nonperformance if the law provides him no means for the performance. Cases of bridge and highway commissioners are cited, in which the commissioners had no funds with which to repair the bridge or highway upon which the injury occurred. (Throop on Public Officers, 737, and cases; *Garlinghouse* v. *Jacobs*, 29 N. Y. 297; *Hines* v. *City of Lockport*, 50 N. Y. 236; Shearman & Redfield on Negligence, § 324, and cases; *Nowell* v. *Wright*, 3 Allen, 166; 80 Am. Dec. 62; Mecham on Public Offices, § 669; Cooley on Torts, 399.)

It is contended by respondents that it appears by the complaint that, even if the duty were laid upon the defendant, the building inspector, to require the building to be properly constructed, yet it also appears by the complaint that defendant had no means provided him of performing this duty, and he is therefore not liable, and the demurrer was consequently properly sustained. But we are of opinion that there are allegations in the complaint which dispose of respondent's contention adversely to him. A total and willful neglect of defendant's duty is charged. It was his duty to "visit and inspect" this building (Ordinance, § 5), and to "see"—that is, to require—that it be properly constructed. The defendant not only did not see or require that the building was properly constructed; but he neglected to visit or inspect the building as required by ordinance (§ 5). Moreover, he refused to visit or inspect the building; and, furthermore, he knew that the building was in process of construction, and his neglect and refusal to visit and inspect the building, or to see that it was properly constructed, was wrongful, and with knowledge. By reason of this neglect and refusal of defendant the accident occurred. So that the charge of the complaint is that the ordinance required defendant to perform certain duties, and that he knowingly and willfully not only neglected, but refused, to perform them, and that, as a result of this neglect and refusal, the injury occurred. But it does not appear by the complaint that the defendant had no means by which he could visit or inspect the building, or see that it was properly constructed, nor does it appear by the complaint that defendant was unable so to do. We are

therefore of opinion that this complaint is good on demurrer, and that if it be true that defendant had not the means or the ability to visit or inspect, or see that the building was properly constructed, or was prevented from so doing, the question of the defense of such matter may be determined upon an answer.

The objections to the complaint, which we have discussed, are those presented by counsel. The judgment of the district court is reversed, and the case is remanded, with instructions to that court to overrule the demurrer.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concurring.—In our opinion the complaint is not vulnerable in the points attacked by demurrer, as contended by respondents' counsel on the argument in this court. The interpretation that the clause of section 5 of the ordinance in question, which provides that "it shall be the duty of every inspector appointed under the provisions of this act to visit and inspect each and any house or houses, building or buildings, which may be in the course of erection, construction, or alteration within the limits of the city, and to see that each house or houses, building or buildings, are being erected, constructed, or altered according to the provisions of this ordinance," lays upon the building inspector no responsible duty of exertion or action in his official capacity, and authority to inspect and demand of builders a compliance with the provisions of that ordinance, or, when "seeing" the same violated, to lay such information before other agents of the city, for the purpose of putting in force the means provided by the municipality for the correction of the violation of its ordinances, is untenable. Such interpretation is neither conformable to the definition of the terms used, as shown by dictionaries of authority, nor in accordance with the common understanding of the force and effect of such a command of law applied to such a subject, or found in context like that under consideration, where, all the way through the ordinance, action is enjoined upon the inspector appointed and compensated to discharge the duties therein prescribed. According to the interpretation of counsel for respondents, the build-

ing inspector might "see" that the ordinance put under his monitory care was complied with or violated with the same supine inertia on his part in either case. Under such interpretation, it would have been quite as well, or perhaps even better, as attended with less draught on the people's revenue, and less danger and deception to inhabitants, arising from the expectation that he would see that any thing was done, for the city to have appointed a stone or wooden statue, as to appoint a sentient being, to discharge the duties of building "inspector"; for, if respondents' interpretation of the provisions of the ordinance declaring his duties is correct, whether seeing that the provisions of the ordinance were obeyed, or being utterly oblivious to that fact, amounted to the same thing, so far as responsibility on the part of the inspector to exert himself to demand obedience or cause arrest of violation went, because, under such interpretation, the inspector might "see" dangerous structures rise up, in violation of the ordinance, to fall and destroy life and property, and yet neither demand compliance with nor report violation of the ordinance to other municipal authorities, in the attempt, at least, to prevent the mischief by setting in motion such means as the municipal government has provided to correct such abuse. This interpretation is not according to the common understanding of the effect of such injunctions of law, as found in the ordinance prescribing the duty of the building inspector.

The other point of objection urged against the complaint—that it does not show that respondent was clothed with the necessary power, or had at his disposal the means of enforcing the provisions of said ordinance, or arresting proceedings in violation of its terms—is not, in our opinion, well taken. Whatever facts in defense respondent may have to shield himself from liability for the injury charged to his negligence should be set up in answer. If he can show that having used the proper diligence in exerting the power of his office, and the other available means which may have been commanded, and having done his duty, the hurt, nevertheless, ensued without his fault, because there were no means of arresting the violation of the ordinance, or because other agents of the municipality did not pursue their duty, if it was necessary to call

upon them, those facts are peculiarly matters of defense, to be set up by defendant's answer. The complaint charges that the damage resulted from the negligence of defendant, in his failure to discharge certain duties pertaining especially to his office. That is the issue which he must meet, and if he is able to show that the damage resulted, not from his negligence, but from other conditions, it is a matter of defense.

From a careful consideration of all the objections urged against the complaint, we think the demurrer should be overruled, and the order of this court will be entered accordingly.

BOARD OF MEDICAL EXAMINERS, RESPONDENT, v. KELLOGG, APPELLANT.

[Submitted March 6, 1894. Decided March 19, 1894.]

PHYSICIANS AND SURGEONS—*Revocation of license—Stay of proceedings.*—The refusal of the trial court to stay proceedings upon an appeal from a judgment revoking the license of a physician to practice his profession will not be disturbed on appeal in the absence of an abuse of discretion; nor will this court in such case upon motion stay the operation of such judgment pending review on appeal.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION by board of medical examiners to revoke the license of a physician. On motion for an order fixing *supersedeas* bond and staying operation of the judgment pending an appeal. Denied.

T. J. Walsh, and *J. W. Kinsley*, for Appellant.

C. B. Nolan, and *Blake & Penwell*, for Respondent.

Per CURIAM.—In this case appellant moves this court for an order fixing the amount and conditions of bond to be executed by appellant and sureties in behalf of a stay of proceedings on, and superseding the operation of, the judgment of the trial court, and asking that. on the execution, approval, and filing of such bond, this court make such an order staying the operation of the judgment pending review on appeal.

By the judgment of the trial court, appellant's license to practice medicine as a physician and surgeon in this state is revoked and annulled, with judgment for costs of prosecution. Therefore, by the effect of such judgment, appellant stands in the attitude of one seeking to practice medicine in this state, but without license so to do; and the act of practicing medicine without license is by statute made a criminal offense, punishable by fine or imprisonment, or both. The effect sought by an order to stay proceedings on the judgment below, in so far as the same regards enforcement of costs, is consummated by the cost bond upon an appeal; but the further effect sought by such order is to license or permit appellant to continue the practice of medicine, notwithstanding the revocation of his license, until review and final determination of the appeal by this court. Whether such an order staying proceedings on the judgment, as sought, would stay the operation of the statute against one practicing medicine without license, and shield him from the prosecution and penalty therefor, especially if the judgment revoking his license be affirmed, is a question of grave importance, which would arise directly for determination in the event of such a prosecution, and which, in this collateral presentation, we do not feel at liberty to determine, as within the purview of this motion. Aside from that view, it appears application was made to the trial court to stay proceedings in relation to the judgment pending the appeal, and such stay was refused. Considering that a stay of such a judgment would be a matter of discretion in the trial court there is nothing shown in this proceeding, at this time, which would lead this court to order the contrary, on the ground that such discretion had been abused.

An order will therefore be entered overruling the motion.

IN RE MOUILLERAT'S ESTATE.

[Submitted February 1, 1893. Decided March 19, 1894.]

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ADMINISTRATORS—*Allowance of claim—Final judgment.*—The allowance of a claim against an estate and its approval by the district judge under section 154 of the Probate Practice Act, providing that every claim so allowed and approved must be ranked among the acknowledged debts of the estate and paid in the due course of administration, does not render such claim a final judgment so as to protect it from attack by protest against the allowance of the administrator's final account. (*Ryan* v. *Kinney*, 2 Mont. 454, distinguished. HARWOOD, J., dissenting.)

SAME—*Same—Contest.*—A creditor whose claim against an estate may be reduced by the allowance of an alleged debt is a person interested in the estate, and may contest the administrator's final account under sections 265 and 267 of the Probate Practice Act, providing that on the day appointed for the settlement of the account any person interested in the estate may appear and contest the same. (HARWOOD, J., dissenting.)

SAME—*Same—Statute of limitations.*—Creditors of an estate may, upon the settlement of an administrator's final account, contest an allowed claim as barred by limitation, since under section 156 of the Probate Practice Act no claim must be allowed by the administrator which is barred by the statute of limitations.

Appeal from Ninth Judicial District, Gallatin County.

PROCEEDINGS by creditors to contest an allowed claim against an estate. The contested claim was disallowed by ARMSTRONG, J. Affirmed.

Statement of the case by the justice delivering the opinion:

Nixon and Crave, creditors of the estate, protested against the allowance of the claim of Mendenhall, a creditor. The district court sustained the protest, and disallowed the Mendenhall claim. Mendenhall and the administrator appeal.

The administrator, J. P. Martin, filed his final account April 20, 1891. This account contains, among others, a list of claims of the fifth class, presented and allowed. In this list were the claims of the protestants Nixon for $142.40, and Crave for $300, and also the claim of J. S. Mendenhall, the appealing creditor, for $400. It appears from the final account that the estate will be able to pay only about forty-six per cent of said fifth-class claims.

The claim of Mendenhall was filed September 4, 1890. His affidavit setting forth his claim contains the following statements material to this inquiry: That on the 2d of September,

1885, an action was pending on the United States side of the territorial district court, on a bond for $1,600, in which case the United States was plaintiff, and Frank Mouillerat, the deceased, and one Olsen, as principals, and Charles Krug and said Mendenhall as sureties, were defendants. That on the 4th of September, 1885, the United States obtained a judgment against the defendants for $800; that Krug and Mendenhall paid this judgment, share and share alike; that neither Mouillerat or Olsen had paid to Mendenhall the $400 which he thus paid, nor any part thereof. Mendenhall annexes to his affidavit, setting forth the above allegations, a certified copy of the proceedings in the United States court in the case, to which he referred. That record is as follows:

"WEDNESDAY, September 2d, A. D. 1885.

"THE UNITED STATES,
vs.
"FRANK MOUILLERAT *et al.*

"And now comes the plaintiff, by William H. De Witt, Esq., United States attorney, whereupon the plaintiffs dismissed their suit herein, the same having been compromised, and eight hundred dollars paid by the defendants.

"It is therefore considered by the court that the defendants go hence without day, and recover against the plaintiffs their costs incurred herein, taxed at $....."

It further appears from the record in the case at bar that this claim of Mendenhall against the estate of Mouillerat was allowed by the administrator June 27, 1890, and approved by the court March 23, 1891.

As above noticed, the final account containing the claim of Mendenhall, and that of the protestants, was filed April 20, 1891. On May 23, 1891, said Nixon and Crave duly filed their protest to the allowance of this final account. The ground assumed by the protestants was, that the claim of Mendenhall shows upon its face that it was not a judgment, and if it be any claim it is one upon an account not in writing, and if it be such an account, sufficient time elapsed between the accruing of the account, September 2, 1885, and filing of the same against the Mouillerat estate, September 4, 1890, to constitute

the bar of the statute of limitations. The district court sustained the protest, and disallowed the Mendenhall claim, from which disallowance Mendenhall and J. P. Martin, the administrator, take this appeal.

The position of appellants is this: 1. That the claim of Mendenhall having been allowed by the administrator, and approved by the court, is a judgment, and cannot be attacked by this protest; and 2. That the protestants, Nixon and Crave, as creditors of the estate, have no authority to plead the statute of limitations, or to compel the administrator to plead it.

Charles S. Hartman, and *A. D. McPherson*, for Appellants.

I. The claim of Mendenhall, being an allowed claim, has all the force and effect of a judgment, and cannot be attacked collaterally. (*Deck's Estate* v. *Gherke*, 6 Cal. 666; *Ryan* v. *Kinney*, 2 Mont. 456; *Moore* v. *Hillebrant*, 14 Tex. 312; 65 Am. Dec. 118; *Estate of Hidden*, 23 Cal. 362; *Estate of Schroeder*, 46 Cal. 304–17; *Estate of McKinley*, 49 Cal. 152; *Estate of Glenn*, 74 Cal. 567; 2 Black on Judgments, § 641, note 678.)

II. The protestants, Nixon and Crave, as creditors of said estate, have no right or authority to plead the statute of limitations or compel the administrator to plead it. (Wood on Limitations of Actions, § 41, pp. 79, 80; 13 Am. & Eng. Ency. of Law, 706, title, Limitation of Actions, note 2, and cases cited; *Scott* v. *Hancock*, 13 Mass. 162; *Kennedy* v. *Powell*, 34 Kan. 23; *Brookville Nat. Bank* v. *Kimble*, 76 Ind. 195; *Allen* v. *Smith*, 129 U. S. 465; *Shields* v. *Schiff*, 124 U. S. 351.) The following authorities hold that an executor or administrator represents the testator so far as the personal property is concerned, and from the personal property he can pay a well-founded claim, although barred, without being obliged to take advantage of the statute of limitations. (13 Am. & Eng. Ency. of Law, 707, note 2, and cases cited.) But even if an allowed claim can be attacked collaterally, or if a creditor can compel the administrator in this case to plead the statute of limitations, is the claim of Mendenhall barred by the statute of limitations? It appears from the face of the proceedings that the sum of $800 was paid by defendants in full settlement of the case and the compromise judgment of

dismissal entered accordingly. This payment was the consideration for the judgment. It also appears that the entire sum that was paid to obtain the compromise judgment aforesaid was paid by said Mendenhall and Krug, who were sureties on the bond, and, being sureties, they had a right to found their claim upon such judgment, and keep it alive as against their codefendants. Upon this question there is some division in the authorities; those of New York, Massachusetts, Alabama, and North Carolina holding in some instances that it cannot be done; however, in one New York court it has been held that under circumstances showing the suretyship of the party paying the judgment, and the fact that he was compelled to pay the sum, that he be substituted in place of the creditor and acquire his rights. On the other hand, the right to the subrogation in such cases is affirmed in *Coffee* v. *Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown* v. *White*, 29 N. J. L. 514; *McIntyre* v. *Miller*, 13 Mees. & W. 728. It appears that Mendenhall and Krug were compelled to pay the $800, and did pay it, and therefore they are entitled to be subrogated to the rights of the United States, the plaintiff in said action. (12 Am. & Eng. Ency. of Law, 150, note 7, and cases cited; B, note 1, and cases cited; *Sanford* v. *McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Null* v. *Moore*, 10 Ired. 324; Freeman on Judgments, § 468.) Mendenhall having been surety on the bond, and having been compelled to pay the claim, equity substitutes him in place of the creditor as of course without agreement therefor. (Freeman on Judgments, § 468; *Sanford* v. *McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Head* v. *Gervais*, Walk. 431; 12 Am. Dec. 577; *Barringer* v. *Boyden*, 7 Jones, 187. See, also, *Dempsey* v. *Bush*, 18 Ohio St. 376; Freeman on Judgments, 470; *Fleming* v. *Beaver*, 2 Rawle, 128; 19 Am. Dec. 629, and cases cited.) This compromise judgment is what Mr. Bishop, in his work on contracts, calls a contract created by law. (See Bishop on Contracts, § 556; *Gunn* v. *Barry*, 15 Wall. 610; *Moser* v. *White*, 29 Mich. 59; *O'Brien* v. *Young*, 95 N. Y. 428; 47 Am. Rep. 64.) Actions upon judgments, contracts, and other written instruments or records, under the statute which controls in this case, shall be commenced within six years from the time the cause

of action accrues. (See Code Civ. Proc., § 41, Comp. Stats.) The claim of Mendenhall is therefore not barred by the statute of limitations, was properly allowed, and the protest of Nixon to the allowance of the administrator should be overruled.

Luce & Luce, for Respondents.

I. There are two points in administration where an approved claim may be contested when application is made for the sale of property, and when an account is rendered for settlement. And it can be contested by a creditor. (*Estate of Loshe*, 62 Cal. 413–15; *Estate of Hill*, 62 Cal. 186; *Weihe* v. *Statham*, 67 Cal. 84.) The supreme court of California in *Beckett* v. *Selover*, 7 Cal. 215, 68 Am. Dec. 237, rendered an exhaustive opinion on the very point in controversy, that the allowance did not bind any one not a party thereto. (See opinion in *Beckett* v. *Selover*, 7 Cal. 241, 242; 68 Am. Dec. 237.) It is true this was a contest by the heir, but the reasoning of the opinion applies to the creditor who contests under section 267 of our Probate Practice Act. If there were any doubt of this, the foregoing citation and the case of the *Estate of Hidden*, 23 Cal. 363, cited by appellants, should be conclusive. This is no collateral attack. Conceding the allowance to be a judgment, it is an erroneous one and has been vacated by the court that rendered it, which it had jurisdiction to do, before final judgment settling this account and decreeing distribution.

II. Upon the second proposition there is little need of comment. A debtor may waive the statute of limitations, and cannot be compelled to raise it, that we know of. An administrator cannot waive it, but both the administrator and the probate court are by statute expressly forbidden to allow a claim barred by the statute. (Comp. Stats., § 156, p. 313; *Estate of Hidden*, 23 Cal. 362.) You must first have a judgment before you can claim the right to be subrogated to the judgment creditor. You must have paid this judgment before any question of subrogation arises. The judgment plainly stated that it is a judgment of dismissal by agreement, and that the defendants recover of the plaintiff their costs; it is a judgment, but it is a judgment in favor of the defendants. A

judgment of dismissal by agreement and compromise is a judgment on the merits against the plaintiff. (*Merritt* v. *Campbell*, 47 Cal. 542; on rehearing, 47 Cal. 548; *Phillpotts* v. *Blasdel*, 10 Nev. 19, 23; *Bank of Commonwealth* v. *Hopkins*, 2 Dana, 395.) No claim has ever been presented to the administrator except this claim on a pretended judgment, which shows on its face that it is a judgment in favor of the very party who claims that it is a judgment against him. If any claim ever existed which could have been brought against Mouillerat, in his lifetime, for money had and received, no such claim has ever been presented to the administrator, and if it had, it would have been barred by the statute of limitations. (*Chipman* v. *Morrill*, 20 Cal. 136.) No action for the recovery of this $800, under said compromise, could ever have been sustained upon the facts set forth in the claim of Mendenhall. Mr. Sheldon (Sheldon on Subrogation, § 240) says: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement in subrogation, and without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." Money paid under a compromise does not come within this rule. (*Sanford* v. *McLean*, 3 Paige, 122; 23 Am. Dec. 773; *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 547.)

DE WITT, J.—Section 154 of the Probate Practice Act provides: "Every claim allowed by the executor or administrator, and approved by the probate judge, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the probate court, and be ranked among the acknowledged debts of the estate, and be paid in due course of administration."

Mendenhall's claim was allowed by the administrator and approved by the court. Appellants contend that these facts constitute a judgment, which is final, and which must be attacked by a motion for a new trial or an appeal, and which cannot be disturbed on a contest of the account of the administrator. But such is not the law. It is a judgment of a quali-

fied nature only. Such approval and allowance place the claim "among the acknowledged debts of the estate, to be paid in due course of administration." (*Magraw* v. *McGlynn*, 26 Cal. 431; *Estate of Loshe*, 62 Cal. 413; *Estate of Hill*, 62 Cal. 186; *Weihe* v. *Statham*, 67 Cal. 84.) And "in due course of administration" the estate reaches the stage where it is operated upon by the provisions of section 265, et seq., of the Probate Practice Act. Section 265 is as follows:

"When any account is rendered for settlement, the court or judge must appoint a day for settlement thereof. The clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper." Section 267 provides for a contest, as follows: "On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same."

When this section of the statute provides that "*any person interested in the estate*" may contest the account, it seems to be a plain declaration that *any person* interested may make the contest. It would seem not open to question that a creditor was interested in the estate when the account showed the allowance of an alleged debt, which such creditor claimed to be wrongfully allowed, and the allowance of which cut down the percentage which such creditor was to receive from the estate. Such is the position of the creditors and protestants, Nixon and Crave, as to the allowance of the Mendenhall claim. Such was the course of proceeding in the lower court. Nixon and Crave contested the account, as they might, under the provisions of sections 265 and 267, etc. The allowance and approval of the claim does not seem to be in the nature of a final judgment, when the statute provides that it shall not be final, but shall be open to a contest (Probate Practice Act, § 267) of the administrator's account. Such seems to be a very plain view

of the statute. On the other hand, the view contended for by appellants would leave a person desiring to contest an account remediless in many cases.

Returning to the portion of the Probate Practice Act treating of the claims against the estate, we have to observe as follows: Section 154 speaks about the allowance of a claim by the administrator, and the approval by the probate judge. These acts may be done without any hearing at all. It is true that section 156 provides: "When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the claimants, and others, on oath, and hear any other legal evidence touching the validity of the claim." The judge, it is observed, may, in his discretion, examine the claimant and hear evidence; but he is not required so to do, and there is nothing to prevent him, if he happens to observe no objection to the claim, from allowing it without any hearing at all. Now, if the probate judge pursues this course, which he may under the law, and which we doubt not is the most frequent occurrence in that court, we have this situation: A claim against the estate has been allowed. Another creditor of the estate is injured thereby, for the reason that it reduces the percentage which he is to receive in case the estate does not pay its debts in full. That creditor is interested in the estate, and there is facing him, according to appellant's view, a final judgment, which is to his injury, given without his knowledge, and without his having a day in court. There has been no hearing to which he has been invited; there has been no adjudication at which he has been notified to appear. Of course, it may be said that he can be present in the probate court, or before the probate judge, during all the period during which claims may be filed, and watch for the presentation of the claim to which he believes he has a valid objection. But we are of opinion that the law does not require any thing of this sort, especially where there is such a simple construction of the law as we have above described, which gives such a creditor an opportunity to come in upon notice upon the settlement of the administrator's account.

Furthermore, here is another view: Suppose a claim be presented, allowed, and approved without a hearing, as it may be,

as above noted; the record would appear in this way: simply the account of the alleged creditor, supported by his *ex parte* affidavit, and indorsed. In fact, the indorsements upon this Mendenhall claim are as good an example as we could cite. They appear as follows:

"No. 20.

"IN THE DISTRICT COURT

"OF

"GALLATIN COUNTY, MONTANA.

"*In the Matter of the Estate of*

"*Frank Mouillerat, Deceased.*

"Claim of John S. Mendenhall, $400.00.

"The within claim presented to J. P. Martin, admr. of said deceased, is allowed and approved for $400.00 this 27th day of June, 1890. J. P. MARTIN, admr. of said deceased.

"Allowed and approved for $400.00, this 23d day of March, 1891. FRANK HENRY, District Judge.

"Filed Sept. 4, 1890.

"JOHN MCLEOD, Clerk,

"By R. H. CRAWFORD, Deputy Clerk."

Now, according to appellant's view, the creditor interested in the estate, and wishing to make a contest, finds a record of the sort described, which is to be held to be a final judgment; that is to say, it is a bill or an account, with an *ex parte* affidavit, and the indorsements of administrator and judge, of "Allowed" and "Approved." What could he present on a motion for a new trial or appeal? His showing of the wrongfulness of the account would not be in the record, nor would there be any evidence to review. We cannot hold such construction of the law when we have before us section 267, providing for a contest by a creditor, in which he may have a hearing.

Ryan v. *Kinney*, 2 Mont. 454, has been mentioned in this case. In that case there was clearly an attempt to attack collaterally a final judgment of the probate court. We fully concur with the decision against that attempt. But here the allowance by the administrator, and the approval by the probate judge, of the Mendenhall claim, we have undertaken to

show, were not a final judgment, and therefore the contest of Nixon and Crave is neither directed at a final judgment nor is it a collateral attack upon what the probate court has done, but, on the contrary, it is a pursuance of the direct proceeding, provided by sections 265–68 of the Probate Practice Act, for determining whether or not the Mendenhall claim was to be paid out of the Mouillerat estate. *Ryan* v. *Kinney*, 2 Mont. 454, did not mention or construe section 267 of the Probate Practice Act, or any similar provision, which section 267, we hold, authorizes the contest by Nixon and Crave. That section is part of the Probate Practice Act passed February 16, 1877 (10th sess., p. 370), a year after the decision of *Ryan* v. *Kinney*, 2 Mont. 454. But even if it, or a similar provision, were a part of the law when *Ryan* v. *Kinney* was decided, it would not have been before the court for construction in that case, as the proceeding was not taken under said section, or any similar thereto. And it is this section, as is apparent above, that we hold authorizes this contest. Therefore, *Ryan* v. *Kinney*, 2 Mont. 454, is not applicable to the case at bar.

Appellants contend that the determination of the action in the United States court in 1885 was a judgment in favor of the United States, and against Mouillerat and his codefendants, among whom was Mendenhall, and that Mendenhall was subrogated to the rights of the United States in that judgment. If that be true, then they contend that the statute of limitations, in reference to judgments, would apply to the Mendenhall claim, and that it would not be barred. If the United States did not obtain a judgment in the case described in the United States court, there was no judgment in which Mendenhall could be subrogated. It is clear that the United States did not obtain a judgment against Mouillerat, Olsen, Mendenhall, or Krug. The record from the United States court states plainly that that case was dismissed as compromised; and it further appears from that record that the judgment was that the defendants go hence without delay, and recover a judgment against the plaintiff for their costs. So, there was no judgment in favor of the United States. Therefore, the most that appears is that Mendenhall paid money for the benefit of Mouillerat in 1885.

Mendenhall's claim against Mouillerat, therefore, does not appear to be founded upon any judgment or upon any written instrument. It was therefore barred by the statute of limitations (Code Civ. Proc., § 44) in three years from September, 1885, and was consequently barred on September 4, 1890, when it was filed as a claim against the Mouillerat estate.

Appellants argue that the statute of limitations is a personal privilege, and that one cannot be compelled to take advantage of it unless he chooses. However true this may be as a general principle, it does not apply to the administrator in this case, for his action is controlled by section 156 of the Probate Practice Act, which provides that "no claim must be allowed by the executor or administrator, or by the probate judge, which is barred by the statute of limitations."

The judgment of the district court sustaining the protest of Nixon and Crave, and disallowing the claim of Mendenhall, is therefore affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

HARWOOD, J., dissenting.—Appellant Mendenhall presented his claim against the estate of Mouillerat, and the same was approved by the administrator and duly allowed by the court. (Probate Practice Act, §§ 153, 154.) About one year thereafter, when the administrator presented his final account for settlement, certain other creditors of said estate set up a contest of appellant's claim, on the ground that it was barred by the statute of limitations. The court sustained said objection, whereby appellant was denied payment of his claim out of the funds of said estate. The claim was for money alleged to have been paid out by Mendenhall, as surety for decedent, in a proceeding against decedent in the United States district court in the year 1885. The record of said court shows the proceeding, and that settlement was made; and the evidence undoubtedly establishes payment by Mendenhall, on behalf of decedent, as claimed. But it is contended that the record of said proceeding in the United States court does not, in itself alone, establish payment by the surety; and therefore it is contended that appellant's claim would fall within the class barred by the lapse of three years.

The first proposition insisted on by appellant is that the due allowance of his claim by the administrator and the court having jurisdiction of said estate, as provided by law, amounted to the establishment thereof in the nature of a judgment, and that said claim was not subject to be contested by other creditors of the estate at the time and in the manner pursued in this contest.

The question as to the effect of the allowance of a claim against an estate, as provided by the statute, appears to be one of considerable difficulty. Some authorities affirm that such allowance places the claim in the same *status* as a judgment (See 2 Black on Judgments, 641, and cases cited; also, California cases cited in appellant's brief); and, if that conclusion is correct, such allowance cannot be disregarded or ignored, and another and independent contest set up against said claim. If the order of allowance is in the nature of a judgment, it would be necessary, in order to avoid such judgment, to follow it up by appeal, and obtain its reversal, or attack it by other direct action.

In support of the proposition that the allowance of the claim against the estate establishes it in the nature of a judgment, several provisions of the statute may be pointed to. Thus, it is provided that, after allowance in the manner prescribed, the claim shall be "filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration." (Probate Practice Act, § 154.) And it is further provided that "a judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in the due course of administration the amount ascertained to be due." (Probate Practice Act, § 161.) This provision might be taken as bearing strongly in favor of the view contended for by appellant—that the proceeding resulting in the allowance of the claim was equivalent in its force to a judgment. Again, there are provisions of statute for the hearing of evidence by the probate judge, as to the merits of the claim, before allow-

ance (Probate Practice Act, § 156); and also for a reference of the claim for investigation through the agency of a referee. (Probate Practice Act, §§ 164, 165.) It seems, too, that the order of allowance, and the proceeding leading up to that order, are subject to rehearing on motion for new trial, as provided in sections 323 and 324 of the Probate Practice Act, and to appeal, as provided in section 445 of the Code of Civil Procedure. (See *In re McFarland's Estate*, 10 Mont. 445.)

The tendency of all those provisions would seem to point to the conclusion that the final allowance of the claim of a creditor against an estate by the administrator and probate judge amounted to some thing more than a proceeding which could be ignored at pleasure, and leave the claim open to contest by any party interested and desiring to question it; and, from a consideration of the statutes relating to this subject, and the cases in which this question has been discussed, I am drawn to the conclusion that such allowance does establish the claim as against the collateral attack of all except the heirs and their representatives. This exception in favor of the heirs is made by statute, but does not appear to extend to others. The language is that "all matters, including allowed claims not passed upon in the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, *may be contested by the heirs*, for cause shown." (Probate Practice Act, § 268.) This section undoubtedly holds the claim open to question by the heirs in a contest independently of the proceedings whereby it was theretofore passed upon and allowed by the court. And the language of that section seems to limit that privilege as one reserved to the heirs alone. If it was not the intention to so limit the privilege to set up another contest as to the claim after its allowance, why did the legislature so specifically declare that those matters were open to contest "*by the heirs?*" We have no doubt this is a wise and just provision in favor of the heir. Where an estate possesses sufficient assets to satisfy all demands, there is no motive to lead claimants to investigate, find evidence, and contest one another's demands when presented for allowance, so as to reduce each claim to its proper proportions, or, if without merit, to cause its disallowance altogether. (*Beckett* v. *Selover*,

7 Cal. 215; 68 Am. Dec. 237.) If the claim, however, after allowance, is only open to contest by the heirs, as seems to be the intendment indicated by the language of the statute, it follows that the several creditors who so desire must present their contest against demands of others when such demands are before the court for allowance. A contrary holding would, in effect, deny all force to the proceeding of the court whereby claims are investigated and allowed, and subject such proceedings to be disregarded at the pleasure of any creditor who wishes to introduce another contest, and occupy the attention of the court in trying the same. Such holding is contrary to the views of the court in *Ryan* v. *Kinney*, 2 Mont. 454, and, I think, is not in harmony with the theory of the statute providing the practice as to the investigation and allowance of claims. There appears to be ample provision made by statute to enable creditors to contest claims proposed against an estate, as the same come up for consideration and allowance; and it would seem that such would be the more convenient and acceptable time for contest of individual claims than a subsequent time, long after the claim had been allowed and the administrator's account is before the court for examination. The result of such holding is to keep the affairs of an estate unsettled indefinitely.

The provisions of section 267 of the Probate Practice Act, that any person interested in the estate may contest the administrator's account, should not be so applied as to annul the force of other special provisions of statute in reference to claims of third persons against an estate. The administrator's account contains numerous items besides accounts of third persons against the estate which have been allowed and approved by the probate court. As to such other terms, the administrator's account should be, and is, open to contest by any person interested. But, as to claims of third persons against the estate, the statute has made special provisions for their presentation, contest, and adjudication, even to appeal from court to court. According to the holding of the majority of this court, such adjudication establishes nothing. It may be brushed aside by any person interested in the estate; and, ignoring that adjudication, although it had gone to the court of last resort, he may

again open the contest when the administrator's account is presented. Such a result is not according to the theory plainly visible in the statutory provisions, nor does it conform to the authorities on the subject, especially decisions of the supreme court of Montana, cited *supra*.

The accounts of third persons against the estate are not in fact the administrator's account. Those accounts are independent of the administrator. He is not the one to prosecute them against the estate, nor to defend the matter of their allowance in case of contest of his account; yet the theory of the majority opinion in this case seems to be that, because the administrator's account may be contested, the allowed accounts of third persons against the estate are thereby thrown open to contest as if they were the administrator's accounts. The administrator would not be the supporter of such accounts; he should, and probably would, be the contestant at the proper time, and until the account was established. Therefore, what difference would it make to him if third persons' allowances were struck out of his account, unless he had paid the same on the strength of the allowance by the court? But observe the peculiar result of the holding in this case. If the administrator, having once contested a claim against his estate, even to the court of last resort, and has been defeated, and the claim established by such adjudication, the administrator can still say, according to the holding in this case—"That goes for nothing"—and, though the estate comprise millions, he may refuse payment, and, when the administrator presents his account, commence the same contest, and go through the courts with it again. Or defenses to claims against the estate may be set up by piecemeal—some when the claim is presented for allowance, and others when the administrator's account is presented; some by one, and some by another, interested in the estate. Or, if defeated at the first trial, this need not be followed up by appeal or motion for new trial, as the statute provides, but the attack may be suspended until a more convenient time. Such are some of the peculiar results of the holding in this case.

The citations in the majority opinion neither support its reasoning nor its conclusion. In the case of *Estate of Loshe*, 62 Cal. 413, the court expressly decline to consider the point

involved in the case here, saying: "It is not necessary to consider how far the allowance or approval of a claim resembles or gives the effect of a judgment." The California court points to the statute of that state as authorizing the contest there under consideration. So, the case of *Estate of Hill*, 62 Cal. 186, cited in support of the majority opinion, is not in point, because the contest in that case was "by the heirs and distributees of deceased." Likewise, the case of *Weihe* v. *Statham*, 67 Cal. 84, cited in support of the majority opinion, was an "action by the heirs of William H. Hill," etc.; and the court say in that case: "It has several times been decided that the allowance of a claim by the administrator and probate judge is not conclusive upon the heirs, but they may contest such allowance in subsequent proceedings of the probate court"; and the California statute and cases are there cited. The same rule would hold here by special provision of the statute, as we have pointed out. The case last above mentioned is the latest case cited from California, and it may be observed how carefully that court uses language to confine the contest at that stage of the claim to the heirs. One other case—*Magraw* v. *McGlynn*, 26 Cal. 431—is cited for support of the majority opinion, but I fail to find any such case reported in the book. These citations illustrate how easy it is to cite cases as supporting a view, and also how deluded one would be in looking to the citations for confirmation of the point in question.

There is no warrant for the presumption asserted in the majority opinion, that the administrator and probate court would neglect the solemn duty, imposed by law upon them, of carefully investigating claims against the estate before allowance thereof; and, had I found reason to subscribe to the conclusion reached in this case by the majority, I should withhold concurrence in the observations which carry that imputation. If such abuse and negligence in relation to a sacred trust, as the opinion "doubts not is the most frequent occurrence in that court," could be satisfactorily established by proper evidence, it would be a matter for legislative consideration. It is well known that in a judicial inquiry as to what the law is, such considerations are not pertinent, except as mere suggestions looking towards the expediency of a legislative change.

But no such conclusion is warrantable as a mere presumption; and there is no showing that the probate courts in this state neglect the solemn duties imposed upon them by law and the nature of the trust confided to their care, nor was that a matter for investigation in the case. My investigation of this question has led to the belief that a statutory provision for vacating the order of allowance of a claim against an estate upon presentation of sufficient grounds, supported by affidavit, within reasonable time, such as that found in the Probate Code of Missouri, would be an improvement of our statute on this point. (See Kelley's Missouri Probate Guide, § 309, p. 261.) There is probably more need for such a provision since the adoption of the constitution, giving our district courts original jurisdiction of all probate matters; for under the former system, if a claim was thought to be erroneously allowed against an estate, the whole question could be carried by appeal, for trial anew, into the district court. (Code Civ. Proc., §§ 445–58.) This gave time and opportunity to reopen the case, and correct errors on appeal. But those provisions have become obsolete through the changes made by the constitution.

DIETRICH v. STEAM DREDGE AND AMALGAMATOR.

14 261
24 146

[Submitted June 23, 1893. Decided March 26, 1894.]

APPEAL—*Special order—Time for taking.*—An order refusing to open a default is a special order made after final judgment, from which an appeal, to be reviewable, must be taken within sixty days.

ATTACHMENT OF BOATS—*Appearance.*—The filing of a demurrer by a judgment creditor of a boat in an action brought to subject it to claims for services, and in which the creditor assumes to act and appear for himself alone, does not constitute an appearance of the defendant boat under section 216 of the Code of Civil Procedure, providing that any person interested in a boat that has been attached may appear for the defendant and conduct the defense.

SAME—*Intervention.*—A party who is a stranger to a suit as commenced, but who, without a showing by complaint or obtaining leave of court, appears upon his own motion and demurs to the complaint, is not an intervenor within section 24 of the Code of Civil Procedure, and his demurrer so filed may be properly disregarded by the trial court.

Appeal from Ninth Judicial District, Gallatin County.

ACTION *in rem*. Judgment was rendered for plaintiff below by ARMSTRONG, J. On motion to dismiss appeal. Granted.

Statement of the case by the justice delivering the opinon:

This action was brought under the provisions of title 7, chapter 5, of the Code of Civil Procedure, as to "Attachment of Boats."

The complaint opens with the allegation: "That the defendant is, and at all times hereinafter mentioned has been, a boat; that the same has no name, to the knowledge of the plaintiff, but has been used as a steam dredge or shovel, with an amalgamator attached for dredging streams and amalgamating purposes." The plaintiff names the owner of defendant as the Montana Mining and Investment Company. The action is *in rem*. The complaint sets up the rendering of services by plaintiff to the defendant boat, the agreed price for the same, the consequent indebtedness to plaintiff, and that the services were rendered on board of the boat in furnishing, operating, fitting out, etc., under a contract made within this state. The further paragraphs of the complaint set out the rendering of similar services to the boat by other persons for certain prices, and the assignment to plaintiff of the claims of said other persons against said boat. The complaint prays for a warrant to seize the boat, and that the claims set out in the complaint be adjudged to be liens against the boat, having preference to any other claims, and for judgment for the amount of the same.

Summons was issued and served upon the alleged boat by posting a copy thereupon, according to the provisions of the Code of Civil Procedure, section 214. The defendant steam dredge and amalgamator itself, or its master, agent, clerk, consignee, or owners (Code Civ. Proc., § 216), never appeared in the action by demurrer, answer, or otherwise.

Within the time allowed by law to file a demurrer or answer, the Commercial National Bank filed what it claims to be a demurrer. That document introduces itself with the following language:

"Comes now the Commercial National Bank, by its attorneys, L. M. Cuthbert and Robert B. Smith, and says that it has an interest in the defendant steam dredge and amalgamator

for the reason that it has a judgment against the same, and execution levied thereon, and is seeking to make a just debt by sale of said property, and therefore demurs to the plaintiff's complaint herein for the following reasons: 1. That said complaint does not state facts sufficient to constitute a cause of action." The instrument then contains a specific demurrer to each count of the complaint. This document is signed as follows: "L. M. Cuthbert and Word & Smith, attorneys for the Commercial National Bank of Cleveland, Ohio." On the expiration of ten days after the service of summons upon the boat, as above noted, the following default was entered:

"In this action the defendant steam dredge and amalgamator, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of the said defendant in the premises is hereby duly entered, according to law, this sixth day of January, A. D. 1892. JOHN MCLEOD, Clerk."

The filing of the alleged demurrer by the Commercial National Bank is the only appearance in the case (if it can be called an appearance) by any person or thing.

This demurrer was not ruled upon by the court, but the court, on June 18th, entered judgment for the plaintiff on the theory of a default, and ignoring the alleged demurrer of the Commercial National Bank. The judgment recites: "And default of the said defendant and the said the Montana Mining, Land, and Investment Company, the owner of the said property so seized as aforesaid, having heretofore been duly entered for not answering or appearing in said action, and no appearance having been filed by the said the Montana Mining, Land, and Investment Company, or by any master, agent, clerk, or consignee of, or any other person interested in, the said boat, dredge, and amalgamator, its tackle, apparel, furniture, and appendages, or by said defendant, and no answer for the said company, or by any master, agent, clerk, or consignee of, or any other person interested in, the said boat, dredge, and amalgamator, its tackle, apparel, furniture, and appendages, or the said defendant, having been filed, and the time for so answering having fully elapsed, the court, having considered

the premises and the sworn allegations of the complaint, finds in favor of the plaintiff," etc. This judgment appears to be entered June 18, 1892.

On June 23, 1892, the following motion was filed:

"Comes now the Commercial National Bank of Cleveland, Ohio, claiming to be the owner of the above property, and moves the court to set aside the default, and open up the judgment in this cause, and allow the Commercial National Bank of Cleveland, Ohio, to file a petition in intervention in this cause, upon the affidavit of Rob't B. Smith, herewith tendered.

"L. M. CUTHBERT and WORD & SMITH,
"Attorneys for the Commercial National Bank."

With this motion was tendered a petition in intervention. The motion by the bank to open the default and for leave to file intervention was denied September 13, 1892.

The bank, on the first day of February, 1893, filed the following notice of appeal:

"*To the above-named plaintiff, Louis Dietrich, and to Messrs. Luce & Luce, attorneys for plaintiff:*

"You will take notice that the Commercial National Bank of Cleveland hereby appeals to the supreme court of the state of Montana from the order and judgment of the above-entitled district court in refusing to entertain the demurrer filed in said cause by said bank, and in overruling the same and entering judgment for plaintiff in said cause, and from the order refusing to open up said judgment, and in refusing to allow the said Commercial National Bank to file its petition in intervention, and make a defense to said action of plaintiff, and to the whole of said orders and judgment, and to each of them, and the said Commercial National Bank objects, and from the same, and each of them, this appeal is prosecuted this January 30th, 1893. L. M. CUTHBERT and R. B. SMITH,

"Attorneys for Commercial National Bank of Cleveland."

This notice of appeal, it is claimed, brings the case before this court for review.

Smith & Word, for Appellant.

Luce & Luce, for Respondent.

I. It is contended that the Commercial National Bank's demurrer should have been considered. The statute (§ 216, p. 112) provides who may appear for the defendant boat. By the naming of the persons that could appear upon the part of the boat all others were excluded, unless they came within the provisions of section 24, page 64, of the Compiled Statutes. *Expressio unius est exclusio alterius.* The demurrer was not an appearance for or on behalf of the boat under the provisions of section 216, nor was the Commercial National Bank one of the persons contemplated by said section who could appear on behalf of said boat, it being neither the master, agent, clerk, or consignee, nor did it stand in any similar condition towards said boat. The words "other persons interested in the boat" mean other persons *ejusdem generis.* When there are general words following particular and specific words, the former must be confined to things of the same kind. (Sutherland on Statutory Construction, §§ 268–73; Sedgwick on Construction of Statutory and Constitutional Law, 360, 361.) If the demurrer filed by the Commercial National Bank was an appearance at all, it was simply an appearance for itself as a judgment creditor.

There is no doubt that the Commercial National Bank had such an interest as that it might have intervened in the action if the proper application had been made to the court. (*Horn* v. *Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569; *Coffee* v. *Greenfield*, 55 Cal. 382.) Not having done so, however, it is an interloper at this time and a stranger to the action.

II. The Commercial National Bank cannot prosecute this appeal. An appeal cannot be prosecuted by a stranger to the record. (*Montgomery* v. *Leavenworth*, 2 Cal. 57; *Ex parte Cutting*, 94 U. S. 14; *Ex parte Cockcroft*, 104 U. S. 578; *Guion* v. *Liverpool etc. Ins. Co.*, 109 U. S. 173; *Bayard* v. *Lombard*, 9 How. 530.)

III. The second order attempted to be appealed from is the order refusing to open up the judgment, and to allow the Commercial National Bank to intervene. The appeal is not tenable at this time for the order was a special order made after final judgment, and no appeal was taken within sixty days.

(Comp. Stats., § 421, subd. 3, p. 174.) That the appeal must be brought within the time specified in the statute or it is lost, see 1 American and English Encyclopedia of Law, 621, and cases cited.

DE WITT, J.—We will first examine the notice of appeal, and ascertain what is before us. In the notice it is stated that the appellant appeals from the order of the court refusing to open the default, and refusing to allow the Commercial National Bank to intervene. These orders were made September 13, 1892, upon a motion made June 23, 1892. These were special orders, made (September 13th) after final judgment, which was entered June 18th. An appeal from a special order made after final judgment must be taken within sixty days. (Code Civ. Proc., § 421.) This appeal was taken February 1, 1893, which was much more than sixty days after September 13th, the date of the orders. Therefore, as contended by respondent, the appeal from the order refusing to open the default and allow the bank to intervene is not before us for review. We cannot, therefore, inquire into the merits of the application to intervene.

Looking further into the notice of appeal, we find that it purports to appeal from some orders which are not appealable, but we think it is fairly construable as an appeal from the judgment. It appeals from "the order and judgment entering judgment." To state that an appeal is from a "judgment entering judgment" is not apt or well-chosen language, but we are of opinion that the intention is expressed to appeal from the judgment, and that we should so construe it. On the appeal from the judgment we may examine the action of the court as to the alleged demurrer of the Commercial National Bank. It is observed by the record that the court did not overrule the alleged demurrer, but, on the contrary, ignored it altogether, treated it as naught, and rendered judgment as if there were no demurrer filed, and upon the theory that the defendant was in default. It is clear that the defendant itself, the alleged boat, did not appear, answer, or demur in this case. Its default was entered after the time for appearing expired, and judgment was rendered against it. But was the filing by

the Commercial National Bank of the demurrer an appearance of the defendant boat?

Section 216 of the chapter of the Code of Civil Procedure, upon the "Attachment of Boats," provides that "any person, master, agent, clerk, consignee, or other person interested in the boat, may appear by himself, his agent, or attorney, for the defendant, and conduct the defense of the suit."

The bank, in its demurrer, states that it has an interest in the boat as a creditor, but the bank does not appear for the defendant. It appears for itself. The demurrer states that it is the bank that demurs. The attorneys sign the demurrer as attorneys for the bank, and not for the defendant. The appeal to this court is taken by the bank, and not by the defendant. Whatever the bank attempted it attempted for itself. It is a creditor trying to get security on the boat, and not a friend of the boat, attempting to defend it. Indeed, the whole contention of the bank in this case is, not that the boat or the owners thereof are aggrieved, but that the bank is injured, and seeks redress by appeal. Therefore, the attempted appearance being by the bank for itself, and not for the boat, and the boat not having appeared in the case below, judgment was properly rendered against it.

Therefore, taking the ground, as the record shows is the fact, that the bank acted for itself in filing the demurrer, did it thus get into court and the case, and become a party to this action? It was not a party when the complaint was filed and the summons issued. It did not become a party by intervening, as permitted by the Code of Civil Procedure, section 24. It was not brought into the case by the court in pursuance to section 26 of the Code of Civil Procedure, nor by the provisions of section 27. If the bank ever became a party in this case, it became so simply by filing the demurrer. But we do not understand what authority it had to file that alleged pleading. The person who may demur to a complaint is the defendant. (Code Civ. Proc., § 87.) The bank was not a defendant. Indeed, the bank neither is now, nor ever was, a plaintiff or a defendant or an intervenor. It is an outsider as to this case. It may be conceded, in this discussion, that the facts were such that the bank could have become an intervenor by properly proceeding

in time under the provisions of section 24 of the Code of Civil Procedure. That section (24) is as follows:

"Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter of litigation in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding any thing adversely to both the plaintiff and defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint."

It is observed that this statute provides how a person may come into a case who has an interest in the litigation, or in the success of either of the parties, or against both. He may not come in of his own motion or "of course." He must make a showing by complaint. He must have leave of court to file the complaint. That pleading must be served upon the other parties, who may answer or demur; and the court must determine whether a proposed intervenor may come into the case. But this bank ignored all these rules of practice and statute. Being an outsider and stranger to the suit as commenced, it never asked leave of court to come into the case. It never presented any complaint to which the parties already in could have demurred or answered. It never gave the court opportunity to determine whether it had a right to intervene. But it steps into the case with its demurrer, and says that it has an interest in the litigation; and this statement, by itself, it determines for itself, in its own favor. It comes into the case "of course," and upon its own motion, and without leave. It is clear that section 24 provides that the court, and not the intervenor, determines all these matters. Under these views, we are of opinion that the district court committed no error when it simply disregarded the demurrer filed by the bank, and entered judgment for plaintiff.

Some very important questions have been argued in this case; for example, as to whether the alleged boat was, under the allegations of the complaint, a boat, and whether a cause of action was shown as to the claims which were assigned to plaintiff. The constitutionality of the statute (title 7, c. 5) is also questioned. But it appears that we have no jurisdiction of this appeal. We have no jurisdiction to open the default and allow intervention, because, as shown above, that appeal was not taken within the time prescribed by statute. (Code Civ. Proc., § 421.) Again, we have no jurisdiction to disturb the judgment, because no person who was ever a party thereto has appealed.

We see no other course but to dismiss the appeal, and it is accordingly so ordered.

PEMBERTON, C. J., and HARWOOD, J., concur.

MANHATTAN MALTING COMPANY, RESPONDENT, v. SWETELAND, APPELLANT.

[Submitted July 31, 1893. Decided March 26, 1894.]

EVIDENCE—*Lost instruments—Copies of record, when admissible.*—Section 264, division 5, of the Compiled Statutes, providing that an instrument or conveyance that is lost or not within the power of the party wishing to use the same may be proved by a copy certified by the recorder, being special in its character, controls section 339 of the Compiled Statutes, making certified copies of all papers filed in the office of the recorder *prima facie* evidence in all cases, which is a general statute, and, therefore, upon the proof of title in ejectment the admission in evidence of certified copies of conveyances, without proof of loss or inability to produce the originals, is error. (*Fick* v. *Gold Hill and Lee Mountain Min. Co.*, 8 Mont. 298, cited; *McKinstry* v. *Clark*, 4 Mont. 370; *Garfield M. & M. Co.* v. *Hammer*, 6 Mont. 53, reviewed and modified.)

Appeal from Ninth Judicial District, Gallatin County.

EJECTMENT. The cause was tried before ARMSTRONG, J. Plaintiff had judgment below. Reversed.

Luce & Luce, for Appellant.

The court erred in permitting the reading from the records of deeds by the witness Vaill, and in allowing the certified

copies to be filed, as the testimony showed the originals to be in the possession of the plaintiff at the time of trial. A copy of the record of any conveyance of real estate or the record itself cannot be used as evidence without proof of the loss of the original, or that it is not within the power of the party wishing to use the same. (Comp. Stats., § 264, p. 662.) Statutes prescribing forms of procedure or modes of proof must be strictly construed and pursued. (Sedgwick on Construction of Statutory and Constitutional Law, 275–78.) So, when the law prescribed the manner in which an act is to be done, it can be done in no other way. (Sutherland on Statutory Construction, §§ 326, 392, 393, and cases cited; §§ 454, 459, and cases cited.) It may be contended that section 839, page 868, of the Compiled Statutes allows a different procedure. This makes copies of records "*prima facie* evidence in all cases." This is a general statute applying to all records and papers filed. The record of a conveyance of real estate only becomes evidence when the loss of the original is shown. It is still secondary evidence if *prima facie*, and must come within the exception. (Sutherland on Statutory Construction, §§ 326–28; *Booth* v. *Tiernan*, 109 U. S. 208; *Macy* v. *Goodwin*, 6 Cal. 580; *Fallon* v. *Dougherty*, 12 Cal. 105; *Reeding* v. *Mullen*, 31 Cal. 104; *Sebree* v. *Dorr*, 9 Wheat. 563.) The same doctrine has been announced by the supreme court of Montana in *Stapleton* v. *Pease*, 2 Mont. 550. The decision in *McKinstry* v. *Clark*, 4 Mont. 370, was based on the admissibility of a notice of location, and was followed in *Garfield M. & M. Co.* v. *Hammer*, 6 Mont. 64, without any distinction between deeds and location notices. The true rule is laid down in *Flick* v. *Gold Hill & L. M. M. Co.*, 8 Mont. 303, to wit: "We understand the true rule to be that, when the law requires a record of any instrument, the record itself is the best evidence of the facts therein stated" . . . . "but the rule itself is limited to such facts and instruments as by law are required to be of record." In other words, the record of a location notice is the best evidence of its contents, it being required to be made by law and filed in the recorder's office as the foundation of the right to possession of the claim. The original deed, however, is the best evidence of its contents, and the record thereof at best is only secondary evidence. Giving

to *Garfield* v. *Hammer*, 6 Mont. 64, and *McKinstry* v. *Clark*, 4 Mont. 370, the greatest possible weight, they amount merely to a construction of paragraph 4 of section 627 of the Code of Civil Procedure. That a certified copy can be used "when the original has been recorded, and a certified copy is made evidence by this code or other statute." A certified copy of a deed is only made evidence when the original cannot be procured. (Code Civ. Proc., § 264. See, also, *Touchard* v. *Keyes*, 21 Cal. 202–11; *Younge* v. *Guilbeau*, 3 Wall. 636; *Brooks* v. *Marbury*, 11 Wheat. 79, 82, 83; *Hensley* v. *Tarpey*, 7 Cal. 288.) "To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the nonproduction of the original must be shown." (C. J. Marshall, in *Smith* v. *Carrington*, 4 Cranch, 70.) The truthfulness of the copy is proved by certificate of the recorder under section 839 of the Code of Civil Procedure; the other facts must be shown by the party desiring to use the same.

Hartman, Hartman & Staats, for Respondent.

PEMBERTON, C. J.—This is a suit in ejectment, wherein plaintiff seeks to recover possession of lot 8, in block 20, of the town of Manhattan, in Gallatin county, and for the rents and damages for the wrongful withholding of the possession thereof by defendant. Defendant, in his answer, denies the material allegations of the complaint, and sets up an alleged equitable title to the property in dispute. Judgment was rendered in favor of the plaintiff. Defendant moved for new trial, which was refused. This appeal is from the judgment and order refusing a new trial.

In the trial of the case the court permitted the plaintiff to prove its title to the land in dispute by offering and using in evidence the records and certified copies of the patent from the government, and all the conveyances of its immediate and remote grantors, without any showing of the loss or inability on its part to produce the original of such patent and deeds. This was done over the objection of the defendant. This action of the court is the principal error assigned in this appeal.

Section 264, page 662, of the Compiled Statutes is as follows:

"When any such conveyance or instrument is acknowledged or proved, certified and recorded in the manner hereinafter prescribed, and it shall be shown to the court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence without further proof."

Section 82 of 1 Greenleaf on Evidence, fifteenth edition, is as follows: "Best evidence required. A fourth rule which governs in the production of evidence is that which requires the best evidence of which the case in its nature is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. . . . . Thus a title by deed must be proved by the production of the deed itself, if it is within the power of the party, for this is the best evidence of which the case is susceptible; and its nonproduction would raise a presumption that it contained some matter of apparent defeasance."

In all cases when the law requires the evidence of a transaction to be in writing, no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. (1 Greenleaf on Evidence, 15th ed., § 86. See, also, *Touchard* v. *Keyes*, 21 Cal. 202; *Younge* v. *Guilbeau*, 3 Wall. 636; *Marbury* v. *Brooks*, 11 Wheat. 79; *Smith* v. *Carrington*, 4 Cranch, 70.)

The respondent contends that this action of the court is justified on the authority of *McKinstry* v. *Clark*, 4 Mont. 370, and *Garfield etc. Mining Co.* v. *Hammer*, 6 Mont. 53. It will be observed upon examination that these cases are mining cases. The law requires that the discoverer of a mine shall record a certificate of his location. The recording of his certificate of location, as required by statute, is a *sine qua non* to acquiring

a perfect title to his claim. The best evidence that an instrument has been recorded which the law requires to be recorded is the record itself. These cases, it is true, are to the effect that certified copies of deeds may be admitted in evidence, without first showing the loss or inability to produce the original by the party wishing to use them. These cases proceeded in this respect upon the theory that the general principles of evidence enunciated in the statutes of this state, and section 839, page 868, of the Compiled Statutes, which reads as follows: "Copies of all papers filed in the office of the recorder of deeds, and transcript from the books of record kept therein, certified by him under the seal of his office, shall be *prima facie* evidence in all cases," and which refers to the duties of the county clerk, controlled the question of the admissibility of such evidence.

The doctrine of these two cases is materially modified in *Flick* v. *Gold Hill etc. Mining Co.*, 8 Mont. 298, wherein the court says: "We understand the true rule to be that, when the law requires a record of any instrument, the record itself is the best evidence of the facts therein stated. In *McKinstry* v. *Clark*, 4 Mont. 370, and *Garfield etc. Mining Co.* v. *Hammer*, 6 Mont. 53, the court seems to have overlooked or ignored the force and effect of section 264, page 662, of the Compiled Statutes. This statute has special reference to the admissibility of the record or certified copy of a conveyance which has been lost, or which is not within the custody, power, or control of the party desiring to use it in evidence, and it specifically provides that such record or certified copy thereof may be used "when it shall be shown to the court that such conveyance or instrument has been lost, or not within the power of the party wishing to use the same." The statute is special in its character, having reference to a special state of facts or condition. The rule in such cases is that a special statute shall control general statutes on the same subject. Our statutes provide that, when a general and a particular provision are inconsistent, the latter is paramount to the former. Compiled Statutes, section 631, page 225, *McKinstry* v. *Clark*, 4 Mont. 370, and *Garfield etc. Mining Co.* v. *Hammer*, 6 Mont. 53, involved in the main the construction of statutes relating to instruments which the law

required to be recorded. The law does not require deeds or conveyances to be recorded. The record of such instruments gives them no vitality. The record is simply a notice to the world. We think *McKinstry* v. *Clark*, 4 Mont. 370, and *Garfield etc. Mining Co.* v. *Hammer*, 6 Mont. 53, in so far as they hold that the record of conveyances, or certified copies thereof, are admissible in evidence, without first showing the loss of the originals, or that they are not within the power of the party wishing to use them in evidence, are in direct conflict with the laws of the state, not supported by the elementary principles of law, or the great mass of adjudications, and should therefore be, in that respect, modified.

The appellant also complains that the court did not determine or pass upon his rights under the alleged equitable defense set up in his answer. As the appellant did not insist upon this alleged defense, or offer any evidence in support thereof on the trial of the case, without passing upon the merits thereof, we are unable to find any error in the action of the court in this particular. There are other errors assigned, but, as the case must go back for new trial, we do not feel called upon to treat them now.

The judgment of the court is reversed, and the cause remanded for new trial.

Reversed.

HARWOOD, and DE WITT, JJ., concur.

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MAYER ET AL., RESPONDENTS, v. CAROTHERS ET AL., APPELLANTS.

[Submitted February 24, 1893. Decided March 26, 1894.]

MINES AND MINING—*Statute of limitations.*—The statute of limitations does not commence to run against a mining claim until the issuance of a patent therefor. (*King* v. *Thomas*, 6 Mont. 409, affirmed.)

NONSUIT—*Directing verdict.*—Where an equitable defense is pleaded to an action of ejectment, and the court peremptorily directs the jury to find for the plaintiff, such direction is, in effect, a nonsuit of defendant's defense, and, therefore, whatever defendant's testimony tends to prove as to such defense must be taken as proved. (*McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15; *Creek* v. *McManus*, 13 Mont. 152, cited.)

SAME—*Ejectment—Equitable defense—Estoppel.*—Where town lots situated upon a patented mining claim are claimed by defendants through conveyances from one who assumed title thereto under an arrangement by which the residents of a mining gulch, at a meeting held for that purpose, resolved to lay off a townsite, and, among other things, provided that each person might take up two lots—the fact that one of plaintiff's grantors attended such meeting and took part in the proceedings, and another took up town lots pursuant thereto, does not create an equitable defense to an action of ejectment brought by the patentees of such claim to recover possession of the portions covered by the lots in controversy. (*Talbott* v. *King*, 6 Mont. 76, cited.)

Appeal from Sixth Judicial District, Meagher County.

EJECTMENT to recover possession of town lots upon the surface of a mining claim. The cause was tried before HENRY, J. Plaintiffs had judgment below. Affirmed.

Toole & Wallace, for Appellants.

I. The court erred in excluding evidence of the adverse possession of defendants and their predecessors in interest prior to the issuance of the patent. After the receipt of the payments for the land and issuance of the receiver's certificate, the United States held the bare, naked, empty title, and the holder was the sole beneficiary in the premises described in it. (Comp. Stats., § 542, p. 202; *Herron* v. *Dater*, 120 U. S. 464; *United States* v. *Freyburg*, 32 Fed. Rep. 195; *Hamilton* v. *Southern etc. M. Co.*, 33 Fed. Rep. 562; *Dahl* v. *Montana Copper Co.*, 132 U. S. 264.) The statute always runs against the *cestui que trust* of a perfect equitable title. (Tiedeman on Real Property, § 715; *Udell* v. *Peak*, 70 Tex. 547; *United States* v. *Beebe*, 127 U. S. 338, in connection with 1 Am. & Eng. Ency. of Law, § 12, pp. 243, 244.) The statutes of Montana have provided how plaintiffs could lose the right to the possession of these town lots, and they have lost it. Even if they could invoke the aid of the United States for their protection, the courts apply the doctrine of laches, when the party seeking to recover is the sole beneficiary. (*Cawley* v. *Johnson*, 21 Fed. Rep. 492; *Hunnicutt* v. *Peyton*, 102 U. S. 368.) In those forms where an equitable title will support or defeat an action of ejectment, the statute will run against such equitable title. (*Moreland* v. *Barnhart*, 44 Tex. 275; *Wright* v. *Hawkins*, 28 Tex. 471; *Cawley* v. *Johnson*,

21 Fed. Rep. 492; *Astrom* v. *Hammond*, 3 McLean, 107; *Peting* v. *De Lore*, 71 Mo. 13; *Hannibal etc. R. R. Co.* v. *Clark*, 68 Mo. 371; *Norris* v. *Moody*, 84 Cal. 143; *Wilson* v. *Fine*, 14 Saw. 38; 38 Fed. Rep. 789, and authorities.) The local laws of the state are distinctly recognized in possessory actions, so far as mining claims are concerned, and the statute runs in all courts, and the legal title in the United States is of no consequence, because ejectment is maintainable. (U. S. Rev. Stats., §§ 910, 914, 1850, 2322, 2324, 2326; *Campbell* v. *Silver Bow etc. Co.*, 1 C. C. of App. Rep. 155; 49 Fed. Rep. 47; *Belk* v. *Meagher*, 3 Mont. 65; U. S. Stats. 1891, § 16, p. 1101, 2d Sess., 51st Congress.) It is the cause of action against which the statute runs, and it is set in motion as soon as the cause of action accrues. (Pomeroy's Equity Jurisprudence, §§ 1396, 1397, note 3, 1405; *Lewis* v. *Soule*, 52 Iowa, 11, 13; *Stearns* v. *Palmer*, 10 Met. 35; Tiedeman on Real Property, § 715; *Roper* v. *Holland*, 3 Ad. & E. 99; 1 Am. & Eng. Ency. of Law, § 12, pp. 243, 244, note 1, and authorities cited; Comp. Stats., § 29, p. 65; *Fancoeur* v. *Newhouse*, 43 Fed. Rep. 241, 242.) And section 39, pages 67 and 68, of the Compiled Statutes show the only exception to the above rule. (Angell on Limitations, 381, 382, 476, 478, 485; *Tynan* v. *Walker*, 35 Cal. 634; 95 Am. Dec. 152; *Woodbury* v. *Collins*, 19 Wis. 60.) So a title, easement, or servitude, acquired under the statute, is absolute and sufficient upon which to base affirmative relief. (*Arrington* v. *Liscom*, 34 Cal. 365; 94 Am. Dec. 722; *Leffingwell* v. *Warren*, 2 Black, 599, 601.) Suppose that the plaintiffs had leased the property for years, and the lessee was in possession when the patent was received by the lessor, would they not be estopped from evicting the lessee on account of his lease? Again, suppose that plaintiff had executed a mortgage upon his right and title to the property, after his certificate had issued, and it had been foreclosed and sold, and the equity of redemption had expired, would the receipt of the patent thereafter cut off the rights of the purchaser and authorize a recovery in ejectment by the patentee? And again, taking the case as it is, being likewise a title acquired under the statute, does the subsequent issuance of the patent reinvest the patentee with a right of possession he has lost under the local

laws? Is it not by force of the local statute that this right is lost in the one case as much as the other, and does not the loss of the right in the one affect the question of the primary disposal of the soil as much as the other? Hence section 2322 of the United States Revised Statutes, granting to the locator, his "heirs and assigns," the exclusive right to the possession of a mining claim, so long as he complies with the local and federal statutes, subjects it to a claim less than a fee, that accrues not only on account of a conveyance, devise, etc., but includes those acquiring rights therein by "other acts of law." (Rapalje and Lawrence's Law Dictionary, title "Assignee.") The rights of defendants are through and under the grantors of plaintiffs, and the plaintiffs are affected by those rights. They are, in the sense of the statute, "assignees" of the locator on account of which the rights of plaintiffs are affected. In this section assignee, in our judgment, means a successor to the interest of the locator, which under the law accrues to an adverse holder for the period of the statute of limitation. It must mean a lawful successor to the interest of the locator to subserve the purpose of the statute, else it is exempt from sale upon execution, or the operations of law by which that title passes. (*Baily* v. *De Crespigny*, L. R. 4 Q. B. 186; *Brown* v. *Crookston etc. Assn.*, 34 Minn. 545; Anderson's Law Dictionary, title "Assigns," 82.) So that "assigns," used in connection with "heirs" before the patent, and referring to rights acquired by location, comprises in law a successor to the interest of the locator. It is, therefore, not an attempt on the part of the state to enlarge the grant, so as to include assigns not otherwise included, but is a provision contained in the act of Congress disposing of the public domain.

II. The court erred in directing the jury to return a verdict for the plaintiffs under the facts in evidence before them. The question is no longer an open one, that the court acts as a special tribunal, under section 2326 of the United States Revised Statutes, for the sole purpose of determining who is entitled to a patent, and cannot exercise its general common law and equity powers in adjusting and determining any other question than that expressly submitted to it. The equitable right of possession as between the applicant, or a legal right

thereto, growing out of a lease or other contract relations, cannot legitimately enter into the issues to be submitted, but the right of possession referred to is a right which carries with it a right to a patent, leaving all others, at least of an equitable character, to be adjusted in a proper forum, *ex post facto* the patent. The judgment is limited to the facts submitted, and is only *res judicata* as to them. The judgment is the basis of the patent, and the patent is only conclusive of the facts upon which that judgment is or can be based. Hence it is, we find the courts holding that these equitable rights between the parties are open for adjudication, notwithstanding the patent. (*Doe* v. *Waterloo M. Co.*, 43 Fed. Rep. 219, 221; *Hunt* v. *Patchin*, 35 Fed. Rep. 816; *Sussenbach* v. *First Nat. Bank*, 5 Dak. 477; *Doherty* v. *Morris*, 11 Col. 12; *Marquez* v. *Frizbie*, 101 U. S. 473; *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; and especially *Rector* v. *Gibbon*, 111 U. S. 276; *Irvine* v. *Marshall*, 20 How. 558; *Burlington etc. R. R. Co.* v. *Johnson*, 38 Kan. 142.) It is now settled law that there may be two freeholders in the same body of earth, measured superficially and perpendicularly down towards the center of the earth, to which theoretically the unlimited ownership of the soil extends. (Washburn on Easements and Servitudes, 558; *Wilkinson* v. *Proud*, 11 Mees. & W. 33; *Rowbotham* v. *Wilson*, 8 El. & B. 123, 142; *New Jersey Zinc Co.* v. *New Jersey Franklinite Co.*, 13 N. J. Eq. 341, 342; MacSwinney on Mines, 26, 268.) The presumption of ownership to the center of the earth arising from ownership of surface may be rebutted by evidence of long, actual, separate enjoyment of the surface and the mines of different owners. (MacSwinney on Mines, 27; *Humphries* v. *Brogden*, 12 Q. B. 739; *Rowe* v. *Greenfel*, Ryan & M. 398; *Curtis* v. *Daniel*, 10 East, 273; *Barnes* v. *Mawson*, 1 Maule & S. 84; *Cox* v. *Glue*, 5 Com. B. 548.) No presumption of surface ownership arises from the fact of ownership of mines. (MacSwinney on Mines, 26; *Tyrwhitt* v. *Wynne*, 2 Barn. & Ald. 554; *Marshall* v. *Ulleswater etc. Co.*, 3 Best & S. 748.) The right of property in the surface and in the underlying mines may be shown to be in different hands. (MacSwinney on Mines, 27; *Rich* v. *Johnson*, 2 Strange, 1142; *Rowe* v. *Greenfel*, Ryan & M. 398;

Hodgkinson v. *Fletcher*, 3 Doug. 34; *Harris* v. *Ryding*, 5 Mees. & W. 72; *Cox* v. *Glue*, 5 Com. B. 548; *Keyse* v. *Powell*, 2 El. & B. 144.) If the grantors of defendants held an available title to the surface in law or equity against the grantors of plaintiffs, it is available in the action against plaintiffs. 1. Because the jury did not have an opportunity to pass upon the notice of defendants and their grantor's equities, as set up in their answer, on account of which, for the purposes of this trial, it must be assumed they had such notice, and that such equities existed. 2. The actual possession and occupancy established by defendants, in themselves and predecessors in interest, which must be regarded as a fact (the instruction shutting it out from the jury), was notice of all their rights and equities, whatever they may have been. (Code Civ. Proc., 33–36; *Hughes* v. *United States*, 4 Wall. 232; and see authorities cited under subdivision 6, which are alike applicable here.) 3. The acts and declarations of McCure and Sutton, aside from the question of possession, while holding the Keegan Lode claim, were competent, and binding upon plaintiffs as their grantees. (Code Civ. Proc., §§ 620, 621; MacSwinney on Mines, 26; *Crease* v. *Barrett*, 1 Cromp. M. & R. 919; *Stanley* v. *Green*, 12 Cal. 148.) 4. If sufficient in such case to raise an equity against the grantors of plaintiffs, it is available against plaintiffs also. (*Bryan* v. *Ramirez*, 8 Cal. 461; 68 Am. Dec. 340; *Stanley* v. *Green*, 12 Cal. 148; *Snodgrass* v. *Rickitts*, 13 Cal. 359; *Carpentier* v. *Thirston*, 24 Cal. 268.) 5. The acts of McCure constituted a donation of the property, and the donee entering and fencing, in accordance with the terms, could not afterwards be evicted by the donor or his successor, with notice of such facts as would put a reasonable person upon inquiry. (*Story* v. *Black*, 5 Mont. 26; 51 Am. Rep. 37; *Hughes* v. *United States*, 4 Wall. 232; *Landes* v. *Brant*, 10 How. 348; *McKinzie* v. *Perrill*, 15 Ohio St. 162, 168; *Jones* v. *Marks*, 47 Cal. 242; *Ray* v. *Birdsey*, 5 Denio, 626; Wade on Notice, §§ 273, 279; *Williamson* v. *Brown*, 15 N. Y. 355; *Harris* v. *Arnold*, 1 R. I. 125; *Rees* v. *Smith*, 1 Ohio, 127; 13 Am. Dec. 599; *Rogers* v. *Jones*, 8 N. H. 264; *Havens* v. *Bliss*, 26 N. J. Eq. 363; *Wickes* v. *Lake*, 25 Wis. 71; *McLaughlin* v. *Shepherd*, 32 Me. 143; 52 Am. Dec. 646; *Bailey* v. *White*, 13

in 6 Utah, 376; *Anzar* v. *Miller*, 90 Cal. 342, which overrules the *dictum* of Justice FOX in *Norris* v. *Moody*, 84 Cal. 143; *King* v. *Thomas*, 6 Mont. 409; *Nessler* v. *Bigelow*, 60 Cal. 98.) Appellants contend, however, that inasmuch as a perfect, equitable title vested in plaintiffs when they obtained the receiver's receipt for the land in question, and that the United States was the holder of the naked, legal title only, and that inasmuch as ejectment may be predicated upon such equitable title, that therefore the statute began to run from the date of such receiver's receipt. Precisely the same argument was advanced in the numerous cases in the state courts where the same point was involved. However persuasive such argument may be it cannot be followed. When the United States gives a patent to a man it gives some thing more than a mere piece of paper; it gives also the right to possess and enjoy the land described in the patent. "With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal of Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued." (*Gibson* v. *Chouteau*, 13 Wall. 100.) The case at bar is clearly within the principle announced in *Sparks* v. *Pierce*, 115 U. S. 412; *Pierce* v. *Sparks*, 22 N. W. Rep. 491 (Dak., Feb. 6, 1885).

II. But counsel for appellants seek to educe a different rule in the case at bar because the premises in dispute are a portion of the mineral lands of the United States; and while conceding that there can be no question of the statute beginning to run only on the issuance of a patent for agricultural lands, that as regards mineral lands it begins to run from the date of the receiver's receipt. It is submitted that this is a distinction without a difference. It is true that the locator of mineral lands has a much greater control over his claim than has an agricultural entryman, prior to final entry, over an agricultural claim; but after such final entry, after the issuance of the receiver's receipt for the entry money, the rights of the agricultural entrymen are fully as broad and comprehensive as those of the mineral claimant. He can dispose of the land; it can be seized under legal process against him; it is subject to

taxation; he has nothing further to do to perfect his title than to receive the patent therefor; he is the owner of the full equitable title; the United States are the holders of the dry, legal title merely in trust for him; his entry "is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty." (See cases cited in *Steele* v. *Boley*, 6 Utah, 376.) And yet with such a title as this, as we have seen in the cases cited, *supra*, the unquestioned rule is that the statute runs not from the date of the receiver's receipt, but from the date of the patent. But we are not without direct authority that as to mineral lands the statute begins to run only from the date of the patent. Precisely the same point was squarely raised and so decided in *King* v. *Thomas*, 6 Mont. 409, and in *Nessler* v. *Bigelow*, 60 Cal. 98, and is involved in *Sparks* v. *Pierce*, 115 U. S. 412. *A fortiori*, if the statute does not begin to run at the date of the receiver's receipt, it does not run from the date of the location of the claim.

III. *King* v. *Thomas*, 6 Mont. 409, was decided in 1887; the rule there announced was a deliberate judicial decision concurred in by all the court; it is safe to say that it has become a rule of property, that many and important rights have grown out of the same, and even, therefore, if this court should doubt its correctness, it at least should follow it under the doctrine of *stare decisis*. (*Pioche* v. *Paul*, 22 Cal. 106; *Smith* v. *McDonald*, 42 Cal. 484.)

IV. As to the so-called equitable defense. It is apparent, both from the plea in the answer and the testimony adduced on the trial, that defendants were not basing their alleged equitable title upon any title dependent upon that of the plaintiffs, but upon a hostile and adverse one, the contention being not only that plaintiffs never owned the lots in dispute, but that even if they had owned them, such title as they had had passed from them to defendants by virtue of their adverse possession under the statute of limitations. This being so, it would follow that not having asserted such adverse claim at the time of the application for the patent to the Keegan lode under the United States Revised Statutes, section 2325, they

are now barred from asserting it. (*Shafer* v. *Constans*, 3 Mont. 369; *Mattingly* v. *Lewisohn*, 8 Mont. 260; *Butte City Smokehouse Lode Cases*, 6 Mont. 397; *Talbott* v. *King*, 6 Mont. 76; *Sparks* v. *Pierce*, 115 U. S. 412.) The authorities cited in appellant's brief are clearly distinguishable from this view. In those cases the claims which were held not necessary to assert under section 2325 of the United States Revised Statutes were such as were dependent upon, and not hostile to, that of the applicant for patent.

V. Appellants seem to claim that the form of the two deeds to plaintiffs is such as to "place them outside the pale of *bona fide* purchasers," possibly on the ground that they contain the words "remise, release, and quitclaim." There is nothing, however, to show that these words were intended to limit the estate conveyed by the words of grant, bargain, and sale. The evident intent of the grantors was to convey specific interests in the Keegan lode, to wit: Ten-twelfths and two-twelfths; and even if they were "quitclaim," pure and simple, they are sufficient to pass the interests conveyed, and would prevail over any older but unrecorded conveyance. (Comp. Stats., div. 5, §§ 260, 270; *Graff* v. *Middleton*, 43 Cal. 341; *Frey* v. *Clifford*, 44 Cal. 335.)

VI. The consensus of all the authorities is to the effect that in order to constitute notice or knowledge to the subsequent purchaser there must be a possession which is actual, open, visible, exclusive, uninterrupted, unambiguous, and inconsistent with the record title; it must be an occupation, a *possessio pedis;* the alleged equitable owner, either in person or by his agents or lessees, must be on the ground itself; the ground must be subject to his will and control; a vacant or constructive possession is wholly insufficient. An intending purchaser is bound to inquire only of those on the ground at the time of the purchase. (5 Lawson's Rights, Remedies, and Practice, 3831, 3832; Wade on Notice, §§ 288, 291; *McMecham* v. *Griffing*, 3 Pick. 149; 15 Am. Dec. 198; *Buck* v. *Holloway*, 2 J. J. Marsh. 180; *Boggs* v. *Varner*, 6 Watts & S. 469; *Meehan* v. *Williams*, 48 Pa. St. 238; *Campbell* v. *Brackenridge*, 8 Blackf. 471; *Ely* v. *Wilcox*, 20 Wis. 523, 531; 91 Am. Dec. 436; *Smith* v. *Yule*, 31 Cal. 180; 89 Am. Dec. 167; *Sanford*

v. *Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748; *Taylor* v. *Central Pac. R. R. Co.*, 67 Cal. 615; Abbott's Trial Evidence, 716, 717.) Fencing a piece of land is not the actual possession or occupation which is essential. (*Wolf* v. *Baldwin*, 19 Cal. 306.) Nor can it be said that such an act is an unambiguous assertion of title, or that it is inconsistent with the record title. The testimony of defendants, wherein notice on the part of plaintiffs was sought to be charged, was wholly insufficient; nor was it in any way as broad as the allegations of the answer; so that if the court did not err in overruling the demurrer to the answer, neither did it err in holding such testimony insufficient to charge plaintiffs with fraud.

VII. Plaintiffs are not estopped from asserting their rights because of the erection by defendants of improvements on these lots. There was no privity between them and no inducements held out; defendants were trespassers from the start as against the rights of plaintiffs; and even if any explanation of plaintiff's nonaction were necessary, it is supplied by the fact that prior to the erection of any buildings the then husband of defendant Cornelia Carothers had sought and obtained permission from plaintiffs to build, and that defendants had not asserted an adverse title until shortly prior to the beginning of this suit.

VIII. Upon the state of facts of this case there was nothing to submit to the jury. If the case has been submitted, and the jury had brought in a verdict for defendants, the court would have been constrained to set it aside as being contrary to the evidence; to charge them, therefore, to find for plaintiffs was no error. (*Martin* v. *Ward*, 69 Cal. 129.)

DE WITT, J.—This is an action in the nature of ejectment. Plaintiffs recovered judgment. Defendants' motion for new trial was denied. From the order and the judgment defendants appeal. The subject of the action is described as lots 5, 6, 7, 8, and 9, in block 5, of the townsite of the town of Neihart. These lots are a portion of the surface of the Keegan mining claim. Plaintiffs became owners of this mining claim by mesne conveyance from the locators on June 30, 1884. On July 27, 1887, plaintiffs were granted a patent by the

United States for Keegan mining claim, in pursuance to an application made by them, and allowed April 4, 1885.

There are two points which are urged by appellants, and which we will examine. This action was commenced June 27, 1891. On the trial the defendants offered to prove facts tending to show an adverse possession of the premises in controversy for a period sufficiently long to bar the action, but a portion of such period was necessarily prior to July 27, 1887, the date of the issuance of the United States patent for the Keegan mining claim. The district court held that such testimony, showing adverse possession prior to the issuance of patent, was not competent, for the reason that the statute of limitations did not commence to run against a mining claim until the issuance of United States patent therefor. This ruling is assigned as error. The district court in this respect followed exactly the decision in *King* v. *Thomas*, 6 Mont. 409, in which case precisely the same point was decided, and in the same manner as in the case at bar. In fact, on this appeal we must, as to this point, affirm the district court, or we must directly overrule the doctrine of *King* v. *Thomas*, 6 Mont. 409. Indeed, the latter is what appellants' counsel, in a very able brief, ask us to do. But to reconsider *King* v. *Thomas*, 6 Mont. 409, would be to disturb a rule of decision and a principle as to titles of real property which are now of seven years' standing. The case of *King* v. *Thomas*, 6 Mont. 409, was decided in the year 1887. It is a matter of history in this state and in this court that at that time very many cases were tried and pending in which the plaintiffs were grantees in United States patents for mining claims, and the defendants were occupying portions of the surface of such claims for townsite purposes. There was great contention at that time in such cases as to how the statute of limitations should be applied as against lands held as mining claims; that is, whether the statute should begin to run at the date of the location of the claim, or at the date of the issuance of the final receipt from the land-office, or at the date of the issuance of patent. *King* v. *Thomas*, 6 Mont. 409, settled this contention, and announced the rule that has now been undisturbed for seven years. It must be that many contentions have been settled under this

doctrine, and that many titles to real estate have been governed thereby. When we regard the history of conflicts between mining claimants and townsite claimants in this state, the doctrine of *stare decisis* in regard to such titles appeals to the court with very great force. We feel at this time that we must decline to reconsider the case of *King* v. *Thomas*, 6 Mont. 409. Counsel refer to *Pioche* v. *Paul*, 22 Cal. 106, and *Smith* v. *McDonald*, 42 Cal. 484. See, also, *Hihn* v. *Courtis*, 31 Cal. 402; *Reed* v. *Ownby*, 44 Mo. 206; *Moore* v. *City of Albany*, 98 N. Y. 410; 1 Kent's Commentaries, 476; *Metcalf* v. *Prescott*, 10 Mont. 293.

The appellants urge a second point as follows: They pleaded and offered testimony on what they insist is an equitable defense. The offered testimony is as follows: In the spring of 1882 about fifteen or twenty people were in the gulch where the town of Neihart now is; on the 6th of April of that year a meeting of those citizens was held for the purpose of laying off a townsite; the Keegan was then a located mining claim; one of its owners, Paul McCure, attended the citizens' meeting, and took part in the proceedings. It was resolved at that meeting that the surface ground in the gulch be laid out for townsite purposes, and the town was named Neihart. From the minutes of that meeting, which were offered in evidence, it appears that the boundaries of said town were fixed; a recorder was appointed to lay out the town and keep a book of records of lots; the size of the lots and widths of the streets were defined, and it was resolved that one person could "take up" two lots only. These lots were "taken up," as it was called, by the recorder making an entry in his book, and transfers of claims seem to have been made in about the same way. In pursuance to the proceedings of this citizens' meeting, James L. Neihart filed upon, or "took up," the ground which is now in controversy. He sold to one Thompson, and Thompson, on August 3, 1884, sold the premises to the defendants, who have put valuable improvements on the same. The owners of the Keegan claim were aware of the proceedings of the citizens' meeting, and one of them, Sutton, took up two town lots in pursuance to the proceedings of said meeting.

The defendants submitted to the court an elaborate set of instructions. In view of the action taken by the court, and

set out below, it is not necessary to review these instructions further than to observe that they propose to submit the so-called equitable defense to the jury. The court refused all of these instructions, and submitted the case to the jury upon one instruction only, which is as follows: "The court instructs the jury that, under the evidence in this case, the defendants cannot recover in this action; your verdict must therefore be for plaintiffs."

We must here turn aside from this alleged equitable defense, and examine for a moment a question of practice as to the action of the court just described. Defendants contend that the action of the court in so peremptorily instructing the jury was, in effect, a nonsuit of defendants as to the equitable defense, but that no motion for a nonsuit was made, and that therefore, although the effect of the action was a nonsuit, yet the defendants were not in a position to apply the rules governing a nonsuit; that is, defendants contend that, instead of nonsuiting their equitable defense, the court took the verdict of the jury thereupon. But in the view that we have heretofore taken of the nature of a direction by the court to find a verdict, we are of opinion that defendants were not injured by the action of the court. When upon a trial the court peremptorily directs a jury to find for the defendant, this is in effect granting a nonsuit against plaintiff, and must be treated as such. (*McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15; also *Creek* v. *McManus*, 13 Mont. 152.) There seems to be no reason why the ruling of a nonsuit against plaintiff should not be applied to what is in effect a nonsuit of defendants' defense. Therefore, in this case, when the court peremptorily directed the jury to find for the plaintiff, it practically nonsuited defendants as to their equitable defense. Therefore the rules and principles applicable to a nonsuit should be applied to defendants' situation in this case. Therefore, whatever defendants' testimony tends to prove as to the equitable defense will be taken as proved, and as the fact.

Therefore, the consideration now before us is whether the citizens' meeting, and the taking up and transfer of lots, and all the other facts detailed, constitute an equitable defense to this action of ejectment. This contention, like the first point considered in this case, we are of opinion is at rest in this state.

(*Talbott* v. *King*, 6 Mont. 76.) We quote from that case as follows:

"Matter is alleged in the answer as an estoppel, and on the trial the defendants sought to prove that the former owners of the Smokehouse claim, and while so the owners thereof, and knowing that the said claim would be in the proposed boundaries of the townsite of Butte, joined others in petitioning the probate judge to enter said townsite for a patent, and in accordance therewith the town site was patented, and the owners of the Smokehouse claim accepted from the probate judge deeds to lots on said claim; and that these owners declared that they would not interpose or assert their title to this mining claim, or any rights thereunder, as against the townsite patent, or those claiming under the same. This testimony was rejected, and error assigned accordingly.

"All these matters alleged as an estoppel took place and were in existence before the time that respondents made their application for a patent to the Smokehouse claim. If they were estopped at all, they were estopped from applying for or receiving a patent. Subsequent to these alleged acts and declarations, the owners of the Smokehouse claim took the necessary steps for procuring a patent thereto. In order to do so, they filed their application, as the law required, in the proper land-office, showing acompliance with the laws, together with a plat and the field notes of their claim, made by and under the direction of the surveyor general of the United States for Montana, showing the boundaries of their claim, and they also, previously to the filing of the application, posted a copy of the plat, with a notice of their intended application, in a conspicuous place on the claim. When such application was filed in the land-office, the register published a notice that such application had been made, for the period of sixty days, in a newspaper nearest to such claim; and also posted a notice in his office for the same period. It is a conclusion from the issuing of the patent that all these requirements were complied with in making their application. (*Steel* v. *Smelting Co.*, 106 U. S. 447.)

"The object of this exceeding care and publicity in applying for a patent for a mining claim is to give notice to any and all

adverse claimants that such application has been made, in order to give them an opportunity to contest in the manner provided by law, and before a court of competent jurisdiction, the applicant's right to a patent for the ground he claims. The conclusiveness of the title by patent grows out of the fact that this opportunity has been given to all adverse claimants to contest the right of the patentee. The theory of the law is that, unless the adverse claimant sets up his title, and controverts the right of the applicant for a patent during the period prescribed for this purpose, he thereby loses his right or title, whatever it may be, and cannot thereafter assert the same. Therefore, if the respondents were not entitled to a patent for the Smokehouse claim, for the reason that they were estopped from applying for and demanding the same, an adverse claim by appellants would have made this fact to appear, and defeated their application."

There is a parallel between the facts offered as a defense in *Talbott* v. *King*, 6 Mont. 76, and the facts so offered in the case at bar, except that in *Talbott* v. *King* it would seem that a much stronger showing was offered by defendants than was shown in the case at bar. Here it is claimed that the mine-owners devoted and donated the surface of the Keegan claim to townsite purposes, by reason of the fact that one of them attended and participated in the citizens' meeting described above. In *Talbott* v. *King*, 6 Mont. 76, the mine-owners petitioned the probate judge, an officer recognized by the laws of the United States as the proper one for such purpose, to enter as a townsite the surface ground of their mining claim, and they thus helped to set in motion the governmental machinery which finally turned out a United States patent for the townsite.

The result of the action of the citizens of Neihart, including the mine owners, was not to obtain any United States title to a townsite, but simply to create a recording office, in which persons could, as it was said, "take up" town lots. On the other hand, the result of the action of the citizens of Butte, including mine-owners, was the issuance of a United States patent. The owners of the Keegan claim "took up" two town lots, in pursuance to the proceedings of the citizens' meeting.

The owners of the Smokehouse claim of Butte accepted deeds from the probate judge for lots granted by the townsite patent from the government. The owners of the Keegan claim participated in the citizens' meeting described, which purported to devote the surface of mining claims to townsite purposes. The owners of the Smokehouse claim petitioned a public officer to apply for a townsite patent, and declared that they would not interpose or assert their title to this mining claim, or any rights thereunder, as against the townsite patented or those claiming the same.

It is said in *Talbott* v. *King*, 6 Mont. 76, that all the matters set up took place and were in existence before the time that the Smokehouse claimants applied for their mining title. Such is true also as to the Keegan claim herein. It is said of *Talbott* v. *King*, 6 Mont. 76, if the Smokehouse claimants were estopped at all, they were estopped from applying for, or from receiving, a patent. Such would also be true as to the Keegan claimants.

We need not compare any further the facts in the Smokehouse case and those in the case at bar. We think it is perfectly apparent that the Smokehouse case decides the appellants' contention here adversely to them. If the facts offered in the Smokehouse case were held not to constitute a defense, then, *a fortiori*, the less forceful facts offered in the case at bar were not a defense, even when their truth is fully conceded.

The order denying a new trial and the judgment are affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J: Without being understood as questioning the doctrine of *King* v. *Thomas*, 6 Mont. 409, we concur in the result.

CROWLEY, APPELLANT, v. BOARD OF COMMISSIONERS OF GALLATIN COUNTY ET AL., RESPONDENTS.

[Submitted March 12, 1894. Decided March 26, 1894.]

ROADS—*Proceedings to open—Validity.*—In an action to enjoin the opening of a road through plaintiff's land it is no objection to the validity of the proceedings laying out the road that, as finally ordered opened, it deviated somewhat from the description in the petition therefor.

SAME—*Same—Qualification of viewers—Record.*—A resolution by a board of county commissioners ordering a road opened in accordance with their order, appointing as a board of viewers three persons "who possess the statutory qualifications," is a sufficient record in their proceedings that the viewers appointed were qualified "as house-holders of said county," as provided by statute.

SAME—*Same—Qualifications of viewers—Relationship.*—The validity of proceedings to open a road are not affected by the fact that two of the viewers appointed to act in such proceedings are related to each other; nor by the fact that one of such viewers was a petitioner for the opening of the road, since the action of the viewers being merely advisory, the party complaining may demand that the question of damages be submitted to a jury, and also has the right of appeal.

SAME—*Same—Width of road.*—It is no objection to such proceedings that the width of the proposed road was not designated in either the report of the viewers or the order opening the road, since the width of all public highways being fixed by statute, such width prevails where the proceedings are silent upon that point.

SAME—*Same—Findings by commissioners—Citizenship of petitioners.*—In the absence of statutory requirements as to citizenship of petitioners for the opening of a road, it is not necessary that the commissioners find in their proceedings that the petitioners were citizens of the United States or of the county, or to make findings in detail of facts, the recording of which is not required by statute.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to enjoin the opening of a county road. Judgment was rendered for the defendants below by ARMSTRONG, J., on demurrer to the complaint. Affirmed.

Hartman & Hartman, for Appellant.

E. L. Knowles & John A. Luce, for Respondents.

HARWOOD, J.—By this action plaintiff invoked the power of the court to enjoin the opening of a road through his land, in his complaint alleging: His ownership of a tract of valuable farming land situate in Gallatin county, giving a particular description thereof; that defendant board of county commis-

sioners of said county and road supervisor threaten to, and were about to, open a road through his said land, pursuant to certain proceedings, to wit, a petition for the establishment and opening of said road as a public highway, and the approval thereof, and appointment of road viewers by said board of county commissioners for the purpose of viewing and reporting upon said proposed road, as provided by law; the report of the viewers; the record of the action of the board of county commissioners thereon, approving said report, and ordering that "said road is hereby established, and ordered opened, according to a resolution adopted by the board of commissioners hereto attached, and recorded in the journal of proceedings of the board of commissioners"; also, the notice that, pursuant to those proceedings, said defendant Sloan, road supervisor of the district wherein said road is established, had been ordered to open and work the same from and after sixty days from the date of said order, in accordance therewith. A copy of which petition, report, resolution, notice, etc., was attached to the complaint as exhibits, to be part thereof. And the plaintiff proceeds to allege: That pursuant to those proceedings the defendant board of county commissioners and said road supervisor of that road district threaten and are about to open a public highway through the described tract of land of plaintiff for the distance of one mile, "one-half mile of which will pass through said land diagonally, and the same will appropriate about six acres thereof for said road, compelling plaintiff to build fence a distance of a mile and a half, at a cost of two hundred and eighty-eight dollars"; thereby rendering valueless, for farming purposes, thirty acres of said land, which is of great value to plaintiff, and that he will thereby also suffer great and irreparable injury and damage to all of his premises. That the proposed opening of said road by defendants, and the pretended notice, and all the proceedings upon which the order for opening said road is based, are null and void, and without any force and effect, for various alleged causes, which are specifically enumerated in the complaint. Such of these alleged grounds for avoiding said proceedings as are relied on by appellant to support his complaint on this appeal will be set forth and considered further along in

this opinion. Upon the filing and presentation of the complaint to the judge of the district court within and for said county, together with the usual bond in such cases, a temporary injunction was by the court granted, forbidding the opening of said road until otherwise ordered by court. Thereafter, defendants appeared, and demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and such demurrer was, upon consideration, sustained. Consequently, the temporary injunction, being without support, was dissolved. Plaintiff declined to amend his complaint, and judgment of dismissal of the action, with costs against plaintiff, was therefore entered, from which judgment and order dissolving the injunction this appeal is brought up by plaintiff.

It is apparent from the record and briefs of counsel that the demurrer was sustained because, in the opinion of the court, the complaint, with the exhibits thereto, shows that the county commissioners had proceeded regularly, and according to the provisions of statute, in the matter of ordering said road opened, as far as that proceeding had gone before injunction issued. With this premise, we proceed to examine the claims on which plaintiff's counsel insist that the proceedings for opening said road are void, as specified in the complaint and their brief.

It is several times averred in the complaint that the proposed road is not sufficiently described in the proceedings for opening the same; but nowhere, either in the complaint or brief, is there specification of defect or error in such description. The proposed road appears to have been sufficiently described to enable plaintiff to make a verified allegation in his complaint that said road "runs through plaintiff's said land a distance of a mile, and for a distance of half a mile, runs through said land diagonally"; that such road will appropriate about six acres of said land, and compel plaintiff to build a mile and a half of fence, at a cost of two hundred and eighty-eight dollars. It seems that plaintiff was able to deduce from the description of said road such exact *data* as to its proposed location and effect on his premises, and all this appears to be directly and readily deducible from the description of

said road given in the various exhibits attached to plaintiff's complaint. That description, as given in the notice of the road supervisor that he would proceed to open said road as directed by said board of commissioners, and work the same sixty days after the date of said order, reads as follows: "Beginning at the N. W. cor. of the N. E. ¼ of sec. 22, T. 1 N., R. 2 E., and run 2,643 feet S. on the quarter line of said sec. 22; thence, in a S. W. direction, to a point on the south line of sec. 22, 1,698 & 8/10 feet east of the southwest corner of said sec.; thence, on same course south, 18 degrees 39 minutes west, 386 & 7/10 ft.; thence south, 10 degrees 45 minutes west, 4,195 & 3/10 ft.; thence south, 42 degrees 40 minutes west, 1,125 & 5/10 ft., to southwest corner of section 27, T. 1 N., R. 2 E.,—in Gallatin county, state of Montana." If this description is not sufficient, plaintiff has failed to specify the points wherein he has discovered defects or uncertainty.

There is also an objection that the petition for the opening of said road did not accurately describe the same, and furthermore, that the road, as finally ordered opened, after report of the viewers, and consideration of the question of opening such road, deviated somewhat from the description in the petition therefor. It is not unlikely that after report of the viewers, and consideration by the county commissioners of the question of opening such road, some deviation from the original proposed location, as set forth in the petition, might be made. Nor has any provision of law been cited, or any reason suggested, forbidding such an exercise of discretion on the part of the public agents charged with the duty of establishing public highways. Such objection seems to be without force. Besides, in this case, the variation between the petition and final order for opening the road does not appear to be very great.

It is further contended that the proceedings of the county commissioners in this matter did not show that the viewers appointed were qualified "as householders of said county," as provided by statute. The resolution of the board of county commissioners authorizing the opening of said road, a copy of which is attached to the complaint, recites "that, in accordance with the order of said board of county commissioners, made March 14, 1893, appointing three persons, who possess the

statutory qualifications, as a board of viewers, and fixing the time for their view, the said road is established, and ordered opened." Such is the affirmance of the resolution of the county commissioners as to the qualification of the road viewers appointed in that behalf. Plaintiff does not allege in his complaint, or assert in the brief of his counsel, that either of said viewers were wanting in the qualifications required by law; but confines his objection to the point that the commissioners did not record in their proceedings that the viewers possessed the statutory qualification, which is evidently a mistake, as shown by the resolution of the board of county commissioners.

Again, it is alleged in the complaint, and contended on this appeal, that said proceedings of the board of county commissioners are void because two of said road viewers were brothers-in-law, and one of them a petitioner for the opening of said road. This is the only objection found in the case which appears to be of any force. It is of paramount importance, as a safeguard to the administration of justice, that those appointed and empowered to decide upon the rights of parties involved in controversy should be disinterested and unbiased; and probably, even in the opening of a public highway, the better rule would exclude from the viewers those who petition for, as well as those who oppose, the opening of the same. But inasmuch as no statute is violated in appointing a petitioner, and inasmuch as the action of the viewers is neither final nor controlling, but their recommendation, at most, is advisory to the board of county commissioners, subject to be objected to, contradicted, and disregarded by the board of commissioners, in its final consideration, and, on the vital question of damage by reason of opening such road, the parties have a right to demand that the same be submitted to a jury, and to appeal to the district court, if dissatisfied, we think, in view of these conditions, the objection that the petitioner was also a viewer is not sufficient to avoid the proceedings. The fact that two of the viewers were related to one another, as brothers-in-law, does not, in our opinion, amount to ground of exception. Jurors sitting in the trial of a cause may be related, and yet

that fact is not disqualification, if they are not related to either party to the controversy.

A further objection urged against these proceedings is that neither the report of the viewers nor the order directing said road to be opened designated the width of the proposed road. The statute on this subject provides that "all public highways hereafter laid out in this state shall be sixty feet in width, unless otherwise ordered." (Comp. Stats., div. 5, § 1822.) In this proceeding it was not otherwise ordered as to the width of said road, and therefore its width is fixed by law; and there is no presumption that the supervisor would depart from the requirement of the law, nor is it alleged that he threatened or was about so to do. The petition asked for the opening of a road sixty feet wide, and finally, after the viewers' report was brought in and considered, the commissioners ordered the supervisor to give the notice required by law, and to open said road. There is no force in the objection that the proceedings did not specifically require that the road be sixty feet wide, inasmuch as the law fixed that width for this road, where the proceedings were silent on that point.

It is further objected that the board of commissioners did not, in its proceedings, make findings of certain facts in detail, namely, that the petitioners for said road were citizens of the United States or of Gallatin county, or that they lived in the vicinity of said proposed road, or that the road would be a public convenience or of public utility, or set forth the names of the parties whose property would be affected by the opening of such road. It is not affirmed that any required fact was wanting in the respects just enumerated, but the criticism is that these facts were not recorded in detail in the proceedings of the board of commissioners. We find no statute requiring that the petitioners for the opening of a road must be citizens of the United States or the county, nor is there any citation of law to that effect. But the petitioners, in their petition for said road, represented themselves as citizens of the United States, "householders of the county of Gallatin, in the state of Montana, and that they reside in the vicinity" of said proposed road. How was this plaintiff injured by the lack of recording

the names of the persons affected by the opening of said road, or other details mentioned in the objection of plaintiff last above stated? The statute does not require the recording of those facts, nor is there any affirmation of a failure to give the notice required by statute in these proceedings to persons interested or affected by the opening of said road. Moreover, some of these objections contradict the record. For instance, the report of the viewers recites that they found "said road to be practicable, and of public utility and necessity." It appears, also, that the county commissioners, on consideration, adopted said report. We find no merit in the last-mentioned objections.

It is further alleged that "the viewers did not cause a survey and plat of the proposed road to be made by the county surveyor, or other competent person, as required by law." This allegation is contradicted by another part of the complaint; for in the exhibit of the report of the road viewers, which plaintiff attaches as part of his complaint, a survey and plat are referred to as follows: "The plat of said road, survey, and report of the surveyor is hereto attached, and made part of this report." Also the resolution of said board of county commissioners requiring said road to be opened, and awarding the estimated damages to plaintiff, contains a reference to the survey and plat of said road, as follows: That on the seventh day of June, 1893, the board of county commissioners proceeded to consider the report of the road viewers, and all objections thereto, "and that it then and there determined to open said road as a county road, and accordingly caused the full and final report of the viewers aforesaid, and plat thereof, to be recorded in the office of the county clerk of said county, in the book kept for that purpose." It is not alleged that no survey and plat of said road accompanied these proceedings, as mentioned. The allegation of plaintiff is that the viewers did not cause a survey and plat to be made "as required by law." This is pleading a conclusion of law, for it is not specified wherein the survey and plat, mentioned in the exhibits to the complaint as having been made, failed to conform with the provisions of law, nor is any such defect pointed out in the argu-

ment. We find no error in the ruling of the trial court. It is therefore affirmed. *Affirmed.*

PEMBERTON, C. J., and DE WITT, J., concur.

ON REHEARING.

Per CURIAM.—Appellant's motion for rehearing, filed herein, is largely a repetition of the former treatment of the case, as presented by the briefs in the original hearing. The province of a petition for rehearing is to call attention to controlling facts or authorities which were overlooked, or not given their proper force and effect, in the determination of the case. The only new matter appearing in this motion for rehearing are some bitter complaints against section 1821 (Comp. Stats., div. 5) of the road law, as being incompatible with American ideas of justice, and repugnant to those rights vouchsafed by our constitution, in that said section provides that, if the owner of land over which a road is laid out by order of the proper public agents feels dissatisfied with the damages awarded him by the viewers and county commissioners he must petition the board of county commissioners for a "way" to ascertain the compensation to which he is entitled by reason of the damage suffered in the premises. This is a misinterpretation of that section. By a reference to the original act on file in the office of the secretary of state it is found that the word "way," as printed in said section, is "jury." The context of that section also shows that undoubtedly the word "jury," in place of the word "way," was the intention of the framers of the road law. The insertion of the word "jury" in place of the word "way," as printed in section 1821 of the road law, would remove the discomforture so bitterly complained of by appellant in this respect. Moreover, if he was dissatisfied with the damage awarded (which appears to have been the case, as shown by his brief originally filed), he was not limited to the jury mentioned in section 1821, to ascertain the damage. By provisions of the same act he is given the right of appeal to the district court to ascertain and recover the damage suffered, but such remedy appears to have been neglected. Motion for rehearing ought to be overruled.

GRIGGS ET AL., RESPONDENTS, v. KALISPEL MERCANTILE COMPANY, APPELLANT.

[Submitted March 6, 1894. Decided April 2, 1894.]

APPEAL—*Motion dissolving attachment—Record.*—A statement will not be stricken from a record on appeal from an order overruling a motion to dissolve an attachment, upon the ground that it was not served within the time required by statute for the preparation and service of statements on appeal, where the statement, while not required on such an appeal, contained all the papers necessary to properly present for review the order complained of.

Appeal from Tenth Judicial District, Flathead County.

ON motion to strike from the record a statement on appeal. Denied.

H. G. McIntire, and *P. J. McLaughlin*, for Appellant.

C. H. Foot, and *Strevell & Porter*, for Respondents.

Per CURIAM.—In this case respondents have interposed a motion to strike from the record the statement on appeal, on the alleged ground that such statement was not prepared or served within the time required by law.

It appears that this appeal is taken from an order overruling a motion to quash attachment issued in said action, which order was made on consideration of the affidavit in attachment, and the complaint. On such an appeal it appears that the practice does not strictly require a statement on appeal, but that the record may consist of the order, with the affidavits on which the order was made annexed thereto, properly authenticated as used on the hearing, "in the place of the statement." (Code Civ. Proc., § 437; Hayne on New Trial and Appeal, § 261.) This record, although made in the form and under the name of a statement on appeal, contains the matter required, properly certified by the judge who made the order, as being the affidavit on which the same was made. Respondents' motion is therefore overruled.

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CARRON, RESPONDENT, v. CLARK ET AL., APPELLANTS.

[Submitted September 5, 1893. Decided April 2, 1894.]

ROADS—*Proceedings to open—Damages—Pleading and proof.*—Upon the trial of an action to enjoin the construction of a county road alleged to have been opened without compliance by the county commissioners with the statutory requirements that the petition for laying out the road be accompanied by an affidavit of posting notices; that the posting of notices by the viewers appointed be proved by an affidavit filed in the county clerk's office, and that such viewers file a report with the said clerk, the mere absence from the files of the clerk's office of such affidavits and report does not prove that no such proofs or report were produced before the board of commissioners when it acted upon the petition and report; nor would the absence of such affidavits from the files establish an averment that no such notices were posted, and where plaintiff offered no further proof of such alleged omissions a nonsuit should be granted.

SAME—*Same—Posting notices—Evidence.*—Though proof of the posting of notices of the time of meeting of road viewers in proceedings to open a road is required to be made by affidavit filed in the office of the county clerk, the testimony of a witness that he actually posted the notices is admissible where the affidavits are absent from the files.

DAMAGES—*Pleading—Evidence.*—Evidence of damage to a crop by stock entering and destroying the same is inadmissible where plaintiff merely alleged in his complaint that the defendant entered upon his land, threw down his fences and exposed his crop, without stating the amount of damage, and concluded with a prayer for judgment for five hundred dollars damages for the trespass.

Appeal from Fourth Judicial District, Missoula County.

ACTION for damages and an injunction. The cause was tried before WILLIAM H. BICKFORD, Esq., special judge, sitting in place of WOODY, J. Plaintiff had judgment below. Reversed.

Henri J. Haskell, for Appellants.

Marshall, Reeves & Marshall, for Respondent.

HARWOOD, J.—When plaintiff rested in the introduction of testimony on his behalf, defendants moved the court for an order of nonsuit of the action (Code Civ. Proc., § 242), on the ground that plaintiff had failed to introduce proof tending to establish certain material allegations of his complaint. The motion was overruled, and that ruling, among others, is assigned as error.

The action was brought to enjoin defendants from opening a public road through a certain field in possession of plaintiff

as lessee, and to recover damages alleged to have been sustained by plaintiff, resulting from the removal of a portion of the fence inclosing said field by defendants in attempting to open said road, as alleged, in violation of the law.

To lay the foundation for establishing the fact that said road was opened by defendants without authority of law because of failure to conform their proceedings in that respect to the requirements of statute, plaintiff alleged in his complaint, among other averments: That no order was ever made by said board of county commissioners establishing said roa ', or declaring it a public highway, on the 3d of December, 1888, or at any other time. That the petition to the board of county commissioners for the opening of said road was not accompanied by satisfactory proof, or any proof, that notice of sai l petition had been given by posting notices thereof on the front door of the county clerk's office, and in three public places in the vicinity of said proposed road thirty days previous to the presentation of said petition, as required by statute. That when the county commissioners appointed viewers to view and mark out said road they did not, as required by statute, cause notices to be posted in three of the most public places along the proposed new road five days previous to the date fixed for the view thereof, giving to parties interested notice of the time fixed by the county commissioners for the viewers to meet; and that no such notices were posted. That a majority of the viewers appointed to view and mark out said road did not sign a report to the board of county commissioners, as required by statute; nor did a majority of the viewers sign any report of the view made by them. That, as plaintiff is advised and alleges, the order of the board of county commissioners establishing said road, or declaring it a public highway, if any such order was made, which plaintiff denies, and the order directing the supervisor of that road district to remove all obstructions from said proposed road, were and are void, on account of the errors and irregularities above specified. There are other allegations of the complaint relating to the damage which would result from the opening of said road, and had already resulted from the attempted opening thereof. All the averments of the complaint were denied by the answer of defendants.

As to proof of the allegations of the complaint, at the trial; plaintiff first introduced considerable testimony as to the field, the fence inclosing the same; the character of the land inclosed, and purposes to which it was devoted (the same being pasture, hay, and wooded lands, with some five or six acres cultivated for raising wheat and oats); and further testimony describing how said road supervisor, in May, 1889, removed certain portions of the fence inclosing said field, claiming to act pursuant to the orders of the board of county commissioners establishing and ordering said supervisor to open such road through said field; and the damage which resulted from the removal of the fence necessary to open such road, and by devastation of stock entering the field through the way thus opened.

Plaintiff then undertook to substantiate, by proof, the allegations of his complaint as to omissions and irregularities charged against said board of county commissioners in their proceedings through which they claimed to establish and open said road as a public highway by authority of law. And the only evidence introduced upon that branch of the case appears to be certain records of the proceedings of the board of county commissioners, introduced and read in evidence by plaintiff, as follows:

An order of June 5, 1888, as follows: "*In the Matter of the Petition of G. W. Dickinson, T. M. McLaren, William Phelps, and others,* asking that a road be laid out and established, commencing at a point on the road leading from Stevensville to Corvallis, on the section line between sections 27 and 34, and following said section line as near as practicable up Burnt Fork until it strikes a point on the road leading past James Phelps', in township 9, R. 12 W. J. A. J. Chapman, Z. T. Saunders, and Sanford Strout appointed as viewers to meet and view said proposed road on June 25th and report at regular September session."

Another order of June 6, 1888, as follows:

"*In the Matter of the Road Petition of G. W. Dickinson, T. M. McLaren, and others.*

"It appearing that the affidavit requiring to be filed as to posting of notices on the presentation of a road petition has

not been filed in the above matter, ordered, that the order made on yesterday, appointing viewers, be, and the same is hereby revoked, and said petition lie over until next regular session."

Another order of September 4, 1888, as follows:

"*In the Matter of the Road Petition of William Phelps, Geo. W. Dickinson et al.*

"Viewers appointed as follows: J. A. J. Chapman, Geo. W. Strout, Zach. Saunders, to meet on October 1st, and report at December session."

And another order of December 3, 1888, as follows:

"*In the Matter of the Report of the Road Viewers Appointed upon the Petition of William Phelps, Geo. W. Dickinson et al.*

"Said report read and adopted, and viewers discharged."

Lastly, an order of April 16, 1889, as follows:

"Ordered, that road supervisor, Thomas Clark, of road district No. 2, remove all obstructions from the road petitioned for by George W. Dickinson, Wm. Phelps et al., which was declared a public highway on the 3d day of December, 1888; and also that he put the said road in shape for public travel."

Plaintiff also introduced in evidence, from papers and files in the office of the county clerk and recorder of said county, a petition for the opening of said road, and an affidavit accompanying the same as follows:

"*To the Honorable, the Board of County Commissioners of Missoula County, in Council Convened:*

"We, the undersigned, residents and freeholders of Missoula county, liable to be assessed for highway labor therein, do hereby make application to you, the said commissioners, to lay out a highway in said county, in township No. 9, commencing at a point on the road leading from Stevensville to Corvallis, on the section line between sections number 27 and 34 and following said section line, 'or as near as practicable,' up Burnt Fork, till it strikes a point on the road leading past James Phelps' in said township, and range 12 west.

"Dated at Stevensville, Missoula county, M. T., May 21, 1888.

"[SIGNED] G. W. DICKINSON, T. M. MCLAREN, THOS. J. MCFARLIN, and forty-one others.

"[INDORSED]: Filed June 4, 1888.

"ALVIN LENT, Co. Clerk,
"By GUST MOSER, Deputy."

"TERRITORY OF MONTANA, } ss.
"County of Missoula. }

"George W. Dickinson, being duly sworn, deposes and says: That on or about the fourth day of June, 1888, he assisted in posting three notices in the following places, to wit: One on the section line between sections 27 and 34, at a point on the road leading from Stevensville to Corvallis, in Tp. 9; one on said section line, near Tom McFarlin's; and one on the said section line on the road leading from Stevensville to E. J. Holt's mill; and sent one to the county clerk, to be posted in the courthouse at Missoula. Said notices set forth that a petition would be presented to the Hon. Board of County Commissioners of Missoula County, to open a public highway on the section line between sections 27 and 34, at a point on the road leading from Stevensville to Corvallis, in Tp. 9 N., of R. 20 west, and running east along said section line, or as near as practicable, till it strikes the road leading from Stevensville to Holt's mill, in Tp. 9, R. 19 west. GEO. W. DICKINSON.

"Subscribed and sworn to before me this 28th day of August, '88. J. R. MCLAREN, Justice of the Peace.

"[INDORSED] 'Affidavit of posting notice for laying out road.'"

According to the record before us, which purports to recite all the evidence introduced in this case, the foregoing records comprise all the testimony offered by plaintiff to establish the allegations of his complaint that the defendant board of county commissioners ordered said road opened without requiring the various notices to be given, and proper report of the road viewers to be returned, as provided by law; and, plaintiff having rested in the introduction of his proof, defendants interposed their motion for nonsuit.

It appears to us, after careful consideration of all the evi-

dence offered, that the motion for nonsuit ought to have been granted. The record in this case clearly discloses that plaintiff failed to introduce proof tending to establish the allegations of his complaint that the board of county commissioners ordered said road opened without the petition therefor being accompanied by satisfactory proof, or any proof, that the notice of the presentation thereof had been given as required by law,—that is, by posting such notices in three public places in the vicinity of said proposed road, and on the front door of the county clerk's office, thirty days prior to the presentation of the petition to the county commissioners, and "that no such notices were in fact posted." Nor did plaintiff introduce proof tending to support the allegation of his complaint that when the board of county commissioners appointed viewers to view, mark out, and report upon said road the county commissioners did not cause notices to be posted in three of the most public places along the proposed new road five days previous to the date fixed for the view thereof, giving notice to the parties interested of the time fixed by the county commissioners for the viewers to meet and proceed to discharge their duties in the premises, as provided by statute; and "that no such notices were posted." Nor was there proof introduced tending to show that no report of at least a majority of the viewers, showing the discharge of their duty in the premises, was returned to the board of county commissioners.

We understand from the presentation of this appeal by counsel that in overruling the motion for nonsuit the trial court proceeded upon the theory that, if the affidavits affirming the posting of the required notices in such proceedings, or a report of the viewers, were not found among the files of the county clerk's office the conclusion must follow that no such proof or report was produced before the board of county commissioners at the proper time, when it acted upon the matters under consideration. (Comp. Stats., div. 5, §§ 1809, 1810, 1815.) And it was further held that if the affidavits showing the posting of such notices were absent from the files of the county clerk's office it must be concluded, as charged in the complaint, that no notices were posted, as required by law. The absence of an affidavit or other paper required to be

returned in such proceedings is not sufficient to establish such a negative as alleged in the complaint, or to give rise to the presumption that the board of county commissioners proceeded in the matter under consideration contrary to the provisions of statute. (*Stockle* v. *Silsbee*, 41 Mich. 615.) Moreover, there is in this record no testimony by the proper custodian that such affidavits and report of the viewers cannot, with diligent search, be found among the files of the county clerk's office. From all that appears in this record, it was not even shown that all the files of the county clerk's office relating to the establishment of said road had been introduced in evidence when plaintiff rested in his production of testimony. Such was the *status* of the case when appellants' motion for nonsuit was made and overruled. By this ruling of the court plaintiff appears to have been relieved of the burden of establishing the allegations of his complaint, charging such material omissions by the board of county commissioners in their proceedings in reference to the opening of said road.

When the motion for nonsuit was overruled, defendants did not rest the case, as they might have done in view of the state in which plaintiff left it, on closing the introduction of his proof. Defendants offered evidence tending to contradict the allegations of the complaint; and, upon offering to prove by a witness that he actually posted the notices of the time fixed for the meeting of the road viewers, such evidence was excluded, on the objection that it was not the best evidence of that fact. It would seem to be an unnecessarily harsh ruling to hold that, if the affidavits were not found among the files of said office, the fact of having actually posted the required notices could not be proved by evidence of a qualified witness, who had knowledge of the actual posting thereof. That character of testimony is regarded by courts as more weighty than a mere affidavit, because subject to more searching tests of verity. It is true that the statute requires that the proof of the posting of such notices shall be shown by affidavits filed in the office of the county clerk and recorder. (Comp. Stats., div. 5, §§ 1809, 1810.) Nor should the filing of such affidavit be neglected. But the absence of such an affidavit from the files of that office does not alone prove that the county com-

missioners neglected or violated the duties imposed upon them by law in the matter of opening a road, or that such affidavits never were filed, as charged in the complaint. If so, the loss of a paper from the files, and the mere showing of its absence, would convict those officers of such dereliction and of trespass, as was sought in this case, and subject them to answer in damages, although in fact there may have been the most faithful and careful observance of the requirements of law on their part. The doing of the various acts required by law in reference to opening a public highway, and not the mere paper evidence thereof, is what authorizes the opening of such road by the proper public agents; and the neglect of doing those things renders void or voidable such proceedings.

Negligence on the part of the proper officials to have filed and recorded, as the law requires, the proper records in such a matter is censurable and punishable. And while it may be that the manner of keeping records in said office, or the delinquency in that respect, merits severe censure, still it would not be conformable to reason or well-established principles of law to declare void the proceedings for opening a road because a required affidavit, for instance, showing the posting of certain notices was not among the files or records of the proper office, if in fact the required notices were posted, and such fact could be shown by evidence considered more weighty than an *ex parte* affidavit, because such holding would exclude the force and effect of the substantial fulfillment of law in such matters, and make the decision turn rather upon a particular method of showing such fulfillment. And pursuing such theory, although the requisite acts were done, and could be shown by evidence of even greater weight than such affidavit, the proceeding would be declared void, because it was not shown by such affidavit. Mr. Justice Cooley, in an analogous consideration, and with his usual clearness, in *Stockle* v. *Silsbee*, 41 Mich. 615, cited above, shows that the law regards the substance of things done in such matters, rather than to make the manner of proving it the criterion for decision when the proceeding is attacked as void. Numerous decisions could be cited to the same effect, but we deem the rule so strongly intrenched in reason as to need no citation to show its justness and propriety. If, however, official conduct

as to compliance with the requirements of law in keeping records was under inquiry delinquency in that regard could not be excused by showing that the required thing was done, although the required record thereof was neglected. That is not the point under consideration in this case, but the observation is pertinent, as relieving this treatment of any implication that such official negligence may, or would be, in the proper inquiry, passed over as unimportant.

Plaintiff properly alleged in his complaint that the commissioners and road supervisor neglected to do certain material things required by statute to give them jurisdiction in the premises. But when it came to the proof plaintiff did not offer evidence tending to prove the omissions charged. With introducing certain papers and records from the county clerk's office concerning the opening of said road, and without even showing that these were all the papers and records filed therein concerning that matter, or that search had been made for others, he rested his case. From these disclosures of the record it clearly appears that the motion for nonsuit should have been granted.

There are other assignments of error as to introduction of proof upon the question of damages. The averments of the complaint as to damage resulting from the acts of defendants are as follows:

"That on or about May 4, 1889, the defendant, Thomas Clark, acting under the authority and orders made by said defendants John R. Latimer, W. J. Kennedy, and John Dooley, acting as board of county commissioners for said county of Missoula, entered upon the land so in possession of plaintiff as aforesaid, and threw down his fences, and exposed his crop, and has, from the said fourth day of May, 1889, kept said fences open, and the crop of plaintiff exposed, and threaten to keep open a public road through and over the land in possession of plaintiff as aforesaid."

The amount of damage resulting from said acts of defendants is not alleged. The complaint, after averring that defendants assumed to act by authority of their office and certain proceedings in opening a public highway through said field, and their

various omissions to comply with the statute in that respect, then closes with the prayer that plaintiff "therefore prays for judgment against the defendants in the sum of five hundred dollars for damages for the trespass aforesaid, and for injunction restraining defendants," etc., from opening and keeping open said road.

The omission to allege the amount of damage resulting from the wrongful acts of defendants, complained of, in throwing down plaintiff's fence, and exposing his crop, is an example of the looseness with which this pleading is drawn, as regards its allegation of damages. But the particular point on which error is urged is that under the allegations of said complaint it was error to admit, over defendants' objection and exception, evidence of the damage to a crop of wheat, hay, or pasture, by reason of stock entering by the way opened by defendants, and destroying the same, because it is only alleged that the crop of plaintiff was *exposed* by opening said fences, and not that the crop was damaged by the entering of the stock thereon. Nor is there any allegation that any particular kind or quantity or value of crop was destroyed, or even that any cattle entered the field through the way opened. The only allegation is that plaintiff's crop was exposed, without averring that it was damaged in any manner or amount whatever. It would be just as pertinent to this allegation to prove damage for money paid out by plaintiff in hiring servants to guard the place opened, as to prove damage for stock entering, under the allegations of this complaint; either of which items of damage might be permissible if the foundation for proof were laid in the pleading. But if either could be properly proved without a more particular allegation, how could a defendant apprehend what damage would be proved against him, and prepare to rebut the charges? (Boone's Code Pleading, § 18, and cases cited.)

On the points mentioned the pleading is unquestionably defective, and it was error to admit such proof over the objection of defendants thereto.

As shown above, the motion for nonsuit should have been granted. An order will therefore be entered remanding the cause, with directions to the trial court to reverse the judg-

ment, and enter nonsuit therein according to the requirement of statute in such cases.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concurred.

STEVENSON, RESPONDENT, v. CADWELL, APPELLANT.

[Submitted October 3, 1893. Decided April 2, 1894.]

APPEALS—*Dismissal—Rules of court.*—A rule of the district court requiring appeals from justice's courts to be filed within thirty days after the appeal is perfected is in no sense jurisdictional, but simply a regulation of practice to be applied with a reasonable discretion, and therefore the failure of an appellant to comply therewith should not be made ground of dismissal where the appeal is filed before the hearing of the motion to dismiss, and it further appears that as appellant was entitled to a jury trial and no jury was in attendance until after the filing of the appeal the respondent could not have been injured by the delay.

Appeal from Ninth Judicial District, Gallatin County.

PLAINTIFF'S motion to dismiss the appeal was granted by BENTON, J., sitting in place of ARMSTRONG, J. Reversed.

Statement of the case by the justice delivering the opinion:

This action was originally commenced in a court of the justice of the peace. Judgment was rendered in favor of plaintiff March 13, 1893. Defendant in due time gave notice of appeal, and filed a bond upon appeal. On March 21st the justice made out his transcript of the proceedings in the case, and left the same with the clerk of the district court. On April 24th plaintiff served defendant with notice of a motion to dismiss his appeal, on the ground that the same was not filed in the district court within the time allowed for filing it, as provided by statute and the rules of practice of the court, nor was the same docketed within the time so allowed. The motion was noticed to be made upon records of the case and an affidavit to be filed. On May 1st defendant paid to the clerk his filing fee, and the case was then filed and docketed. The defendant filed his affidavit in resistance to the motion to dismiss. The motion was heard May 8th, and granted. Defendant's appeal

was dismissed, and judgment for costs was rendered in favor of plaintiff. Defendant now appeals.

E. P. Cadwell, pro se.

There is no statute or practice to sustain the order appealed from. The only authority the district court had for making said order is its rule 2, and the only warrant for said rule is section 523, page 198, of the Code of Civil Procedure. Of course this statute means, if it means any thing, that to regulate the practice and procedure rules may be made. Not to make a new practice or procedure, or to change in any way that which is already existing, but to regulate that already existing and established by the code. Clearly the rule is not such as is contemplated by section 523. For instead of regulating a practice already in vogue it tears down and endeavors to establish a new practice; gives back to the justice's court that which the law says it has parted with—its jurisdiction. Admitting the rule to be good, is not the object of all rules of court to promote justice rather than to defeat it? Such is the doctrine of the California courts. (*People* v. *Williams*, 32 Cal. 281; *Pickett* v. *Wallace*, 54 Cal. 147; *People* v. *Lee*, 14 Cal. 512.) Here is a cause in which the appeal was perfected during a vacation of the district court, at a time when the jury was not in attendance upon the court. The cause is a jury cause. It could not be tried until one week after the transcript was in fact filed. Who was prejudiced? Certainly not the plaintiff, for the cause could not have been tried at any time between the date of the appeal and the actual filing of the transcript. The rule at best is merely directory—not jurisdictional—and this supreme court has repeatedly held that being so it should be liberally construed. (*State* v. *Baker*, 8 Nev. 141; *McQuillan* v. *Donahoe*, 49 Cal. 157; *Territory* v. *MacKey*, 8 Mont. 169; *People* v. *Lake Co.*, 33 Cal. 487; *Territory* v. *Flowers*, 2 Mont. 392; *Wood* v. *Forbes*, 5 Cal. 62; *Shaw* v. *Randall*, 15 Cal. 384.)

Staats & Holloway, for Respondent.

The authority of the district judge to make the rule is unquestioned. (Code Civ. Proc., § 523; *McKay* v. *Superior*

Court, 86 Cal. 431.) Upon the failure of appellant to file the transcript within the time prescribed by the court rules the appeal will be dismissed. (*In re Reed's Estate* (Cal. March 17, 1892) 29 Pac. Rep. 245; *Trabing* v. *Meyer*, 3 Wyo. 133; *Collins* v. *Johnson*, 3 Wyo. 133; *Levy* v. *Everett* (Cal., Oct. 4, 1892), 31 Pac. Rep. 111; 1 Am. & Eng. Ency. of Law, 627; *McKay* v. *Superior Court*, 86 Cal. 431.) The filing of a transcript after notice of motion to dismiss for failure to file within the prescribed time will not cure the defect. (*Welch* v. *Kenney*, 47 Cal. 414.) If the rule is merely directory, as appellant claims, then its enforcement in this case was a matter purely within the discretion of the court, and no error can be predicated of the ruling unless there was a violent abuse of that discretion, which we feel sure will not be imputed of the honorable judge presiding, and that this court will follow the universal rule that orders or decrees involving the exercise of judicial discretion are not subject to review in a court of errors; only a violent abuse of that discretion will be interfered with. (*Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall. 598; *United States* v. *Atherton*, 102 U. S. 372.) Abuse of judicial discretion which will justify interference with, implies not only error of judgment but partiality, passion, and perversity of will. (*People* v. *New York Cent. R. R. Co.*, 29 N. Y. 431; *White* v. *Leeds*, 51 Pa. St. 189.)

DE WITT, J.—There was a rule of the district court that appeals from justice's courts to the district court must be filed within thirty days after the appeal is perfected, and that if, through the neglect of the appellant, the same be not so filed, the appeal may be dismissed. The appeal was not filed in the district court within thirty days after it was perfected, and in consequence thereof the district court dismissed the appeal. The only inquiry which we will make is whether the district court exercised a sound discretion in applying this rule and dismissing the appeal. We are inclined to think it did not. Defendant's appeal was perfected as required by statute. The dismissal was not for a failure to comply with the law, but, on the contrary, for simply neglecting to observe a rule of the court. The object of the rule is certainly not to deny parties

a hearing who wish one. The object is to require appeal cases to be brought on promptly for trial. It seems to us that the object of the rule was attained in this case. The appeal did not lie unheard for any unconscionable length of time. Respondent gave notice of his motion to dismiss at once upon the expiration of the thirty days. After respondent had served appellant with notice of his motion, and a week before the motion was heard, appellant gave to the clerk of the district court his filing fees, and the appeal was filed and docketed. It also appears that this was a case wherein appellant was entitled to a jury trial, and that no jury was in attendance upon the court from the date of appeal until May 1st, the day when the case was docketed. Therefore respondent was in no way injured. He could not have had a trial sooner under any circumstances. This rule of the court is in no sense a jurisdictional matter. It is not like some statutes regulating appeals where a compliance with the statute is necessary to give the court jurisdiction. The rule was simply a regulation of practice which the court must apply with a reasonable discretion.

We are not satisfied that an appellant should be turned away from court under the circumstances shown in this case. We believe that the results sought to be accomplished by the rule were in fact attained—that is, the opportunity for a speedy hearing of the appeal—and, that being true, the rule should not have been used to wholly deny a trial of the case. The action of the district court is reversed, and the case is remanded, with instructions to deny the motion to dismiss the appeal.

The respondent makes no question as to reviewing, on appeal, the action of the district court in this case. (*Howard* v. *Quinn*, 2 Mont. 340; *Marsh* v. *Kinna*, 2 Mont. 547; *Territory* v. *Milroy*, 7 Mont. 559.)

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

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CASEY, RESPONDENT, v. WRIGHT, APPELLANT.

[Submitted October 3, 1893. Decided April 2, 1894.]

TAXATION—*Cloud upon title—Complaint in action to remove.*—A complaint in an action to set aside a tax deed as a cloud upon plaintiff's title, which avers an irregular assessment of the property in controversy and its subsequent sale for unpaid taxes, but which does not allege some injustice or injury to plaintiff resulting from such assessment, or that plaintiff has paid, or offers to pay, the taxes for which the property is properly chargeable, fails to state a cause of action for equitable relief.

SAME—*Sale of property in gross.*—A tax sale of plaintiff's town lots, in connection with others, for the gross amount of taxes due upon all is void.

Appeal from Seventh Judicial District, Custer County.

ACTION to remove a cloud upon title. Judgment was rendered for the plaintiff below by MILBURN, J. Reversed.

Middleton & Light, for Appellant.

Strevell & Porter, for Respondent.

PEMBERTON, C. J.—Plaintiff claims in his complaint to be the owner of lots 1, 2, and 3, in block 81, of Miles City in Custer county in this state, and alleges that the defendant claims some interest or title therein by virtue of a tax deed to said property, which is of record in said county, and which said tax deed is claimed to be a cloud on the title of plaintiff to said property. This suit is brought to remove said cloud.

The plaintiff alleges in his complaint, in substance, that said lots were attempted to be assessed for taxes for the year 1888, by the assessor of said county; that the assessment thereof was invalid, for the reason that said lots were assessed in gross, and not separately; that the taxes thereon for said year were not paid, and that they were thereafter sold by the treasurer of said county for such delinquent taxes; that said lots and eight others in different blocks of said Miles City, were sold in a lump, or in gross, for the total amount of taxes remaining unpaid for said year 1888 on all of said lots so sold by said treasurer; the plaintiff alleging such gross assessment and gross sale of said lots, being in violation of law, were, for such reason, void.

The defendant demurred to the complaint on the ground

that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled. The defendant filed his answer, which contains a general denial in words and form, but he sets out therein the assessment of said lots for said year 1888, contained in the tax list including said property for said year, which list was made out and returned by the assessor, as no owner of said property returned any list thereof for said year. The answer also contains a copy of the certificate of sale of the transfer of said property so sold for taxes for said year, and also a copy of the tax deed attacked in this action. From these exhibits, which are part of the answer, and must be construed with the denial therein contained, we think the allegations of the complaint, in these respects, were not sufficiently denied. On these grounds, among others, the plaintiff demurred to the answer, and the demurrer was sustained. Defendant declining to amend, and having decided to stand on his answer, judgment was rendered in favor of the plaintiff. Defendant appeals from the judgment.

The first assignment of error is the action of the court in overruling defendant's demurrer to the complaint. The complaint contains no allegation of payment, or any offer to pay whatever just amount of taxes such lots were legally chargeable with for the year 1888. Defendant claims that, although the assessment complained of may have been irregular, and, in some cases, might be held invalid, yet that in this equitable proceeding for cancellation the plaintiff, before he can ask equity, must do or offer to do equity, which rule would require that he pay or offer to pay the just amount of taxes for which said lots were legally chargeable for said year. Defendant further claims that said complaint does not charge that the taxes assessed against said lots were unjust or unequal, or show any other equitable grounds for not paying them.

In *Stockle* v. *Silsbee*, 41 Mich. 615, in a case involving an irregular assessment, Mr. Justice Cooley says: "In reviewing the case it is a little embarrassing not to find the defects which are supposed to be fatal pointed out, especially as the finding recites many irregularities, some of which are obviously trivial and unimportant, and unworthy of a moment's consideration. Possibly some of these may have seemed to the court fatal,

but the time has gone by, if it ever was, when the proceedings of taxing officers are to be criticised with microscopic nicety; and the exact time and method of every step examined to detect a departure from the law, however insignificant or unconstitutional. The policy of the law is that parties shall pay legal taxes, even though there may be some irregularity in demanding them, and that they shall complain to the courts of those errors only which may injure them. The possibility of collecting the state revenue depends upon the observance of this policy, and we do not feel called upon to examine in detail every irregularity which a record may show."

In *Fifield* v. *Marinette Co.*, 62 Wis. 532, a case similar to the one at bar, the court says: "It was further said in the case of *Hart* v. *Smith*, 44 Wis. 218: 'Nor do we understand that the rule, long established in courts of equity, that he who seeks equity must do equity, is qualified or abrogated in favor of a party who seeks to remove a cloud upon his title to real estate by reason of illegal proceedings taken to enforce a valid tax assessed thereon, and that such party may demand as a right from a court of equity that such cloud shall be removed without his doing what justice and equity demand; that is, pay the tax. None of the cases in this court recognize any such right on the part of the plaintiff, and we think no such right exists. It would be a gross impeachment of the power of a court of equity to deny it the right to demand of its suitors good faith and common honesty before it shall be compelled to grant them any relief.' . . . . We must hold, therefore, that a complaint which does not allege in direct terms the injustice and inequality of the tax assessed upon the plaintiff's lands, and further allege a state of facts which, if proved on the trial, would establish the truth of the general allegation of its injustice, does not state facts sufficient to constitute a cause of action for equitable relief, unless there be a further allegation of an offer to pay the taxes justly chargeable to the property of the plaintiff on account of which he seeks relief."

In *Wisconsin Cent. R. R. Co.* v. *Lincoln Co.*, 67 Wis. 478, where the assessment roll was not signed or verified by the assessor, as required by law, the court say: "The question is, do these irregularities and defects in the assessment and levy-

ing of the taxes of 1876, or either of them, render the tax proceedings so utterly null and void that it can correctly be said that no taxes were assessed against the plaintiff's land in that year? If none were so assessed, probably the exception in section 4, chapter 21, of Laws of 1877, will not apply to such lands. We conceive that the judgment of this court in *Fifield* v. *Marinette Co.*, 62 Wis. 532, answers the above question in the negative. In that case, as in this, the document purporting to be the assessment-roll, and which was the foundation of all the subsequent tax proceedings, was not signed, or otherwise verified, by the assessor. It was held that the tax certificates were not necessarily void in equity because of such omission, and that, to entitle the plaintiff to relief, he must show that the tax levied against his property was unequal and unjust; and, as a condition of relief, he must offer to pay the sum as taxes which in justice and in equity he ought to pay. In other words, it was held that such defective assessment is not a nullity, furnishing no foundation for a tax based upon it; but that a court of equity regards such assessment and tax levy as conditionally voidable; the condition being that the party complaining of the omissions and defects in the tax proceedings must show that these have resulted in injustice to him, and must pay, or offer to pay, the amount which, under a just assessment, would be required of him." In *State* v. *Cooper*, 59 Wis. 666, the court says: "The relator is asking relief from an improper assessment in view of taxation. In such a case he must show equity in his behalf and not attempt to evade just taxation." In *Northern Pac. R. R. Co.* v. *Patterson*, 10 Mont. 90, this court quotes with approval the language of Mr. Justice Miller in *National Bank* v. *Kimball*, 103 U. S. 732, which is as follows: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay; that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of

equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of the government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be, but that, before he asks this exact and scrupulous justice, he must first do equity, by paying so much as it is clear he ought to pay, and contest and delay only the remainder. (*State Railroad Tax cases*, 92 U. S. 575.) This bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid." (See, also, *Ward* v. *Commissioners*, 12 Mont. 23.)

From a consideration of these authorities it seems to us that the complaint should allege some injustice or injury to plaintiff, resulting from said alleged invalid assessment, or payment, or an offer of payment, of the just and legal taxes for which said property was properly chargeable for said year 1888, before equity will grant him the relief sought in this action. In this respect we think the complaint bad, and the demurrer thereto should, for these reasons, have been sustained.

The appellant further complains of the action of the court in sustaining the demurrer of plaintiff to the answer. The answer discloses the fact, as shown above, that the lots in controversy, with eight others, were sold by the treasurer of said county, all together, for the gross amount of taxes due on the eleven lots for the year 1888.

In *Terrill* v. *Groves*, 18 Cal. 149, a case very similar to the one under consideration, the court says: "The plaintiff claims under a tax deed. It seems that these lots were assessed as the property of one Alonzo Green. They were separately listed, but valued jointly, and the aggregate tax on all of them, and of two other lots in other blocks, set down. The lots sued for were contiguous to each other, and formed a part of block number twenty-eight on the plan of the city. These lots were put up and sold together for the aggregate amount of this tax. The appellants contend that this was illegal, and that the sale and the consequent deed were void; and we are of the same opinion." We think the authorities are almost uniform that

such a sale is void. (See Blackwell on Tax Titles, 4th ed., 313; Cooley on Taxation, 341, 342, and authorities cited.)

We think, therefore, there was no error in the action of the court sustaining the plaintiff's demurrer to the answer of defendant. But it does not follow because the sale of said property was void that the assessment of the three lots in controversy was also void. In this proceeding we hold the assessment voidable only upon a proper showing that the assessment was unjust or injurious to plaintiff, or that he had paid, or offered to pay, the amount of taxes justly chargeable to said property for said year 1888, which amount is easily ascertainable from the tax books and rate of assessment for said year, said three lots having been assessed separately from the eight others with which they were sold.

There are other errors assigned, and extensively discussed in the briefs, but we do not consider it necessary to treat them, as we think the matters treated are decisive of the case. The case is reversed and remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings in conformity with these views.

Reversed.

HARWOOD and DE WITT, JJ., concur.

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McCULLOH, RESPONDENT, v. PRICE, APPELLANT.

[Submitted October 6, 1893. Decided April 9, 1894.]

DEEDS—*Description—Assignments.*—A description of real estate in a deed of assignment, as all the lands of the grantor of every description belonging to him and wheresoever situated, passes the title of the lands to the assignee, and is not insufficient as being too general.

SAME—*Assignment—Exemption.*—A deed of assignment conveying all the grantor's lands is not void for uncertainty in that it excepts property exempt from execution under the laws of the state, which exempt property is not specifically described.

Appeal from First Judicial District, Lewis and Clarke County.

EJECTMENT. The cause was tried before HUNT, J. Plaintiff had judgment below. Affirmed.

Henry C. Smith, for Appellant.

H. G. McIntire, for Respondent.

A deed of assignment containing a general description of the property assigned is sufficient to pass the title to real estate. In the following authorities deeds, mortgages, and assignments for the benefit of creditors have all been discussed. (*Wilson* v. *Boyce*, 92 U. S. 320–25; *Brashear* v. *West*, 7 Pet. 608–14; *Pettigrew* v. *Dobbelaar*, 63 Cal. 396; *Lick* v. *O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383; *Frey* v. *Clifford*, 44 Cal. 343; *Sadler* v. *Immel*, 15 Nev. 269; *Brown* v. *Warren*, 16 Nev. 237; *Kellogg* v. *Slawson*, 15 Barb. 58; *Platt* v. *Lott*, 17 N. Y. 478; *Turner* v. *Jaycox*, 40 N. Y. 472; *Raynor* v. *Raynor*, 21 Hun, 36; *Jackson* v. *Delancey*, 11 Johns. 365; *Strong* v. *Lynn*, 38 Minn. 315; *Jamaica etc. Corp.* v. *Chandler*, 9 Allen, 159; *Harmon* v. *James*, 7 Smedes & M. 111; 45 Am. Dec. 296; *Blair* v. *Bruns*, 8 Col. 397; *Bitner* v. *New York etc. Land Co.*, 67 Tex. 341; *Harvey* v. *Edens*, 69 Tex. 420; *Prettyman* v. *Walston*, 34 Ill. 175; *Bird* v. *Bird*, 40 Me. 398; 6 Lawson's Rights, Remedies, and Practice, § 3017, p. 4889; Boone on mortgages, § 6; 1 Jones on Mortgages, § 65; Burrill on Assignments, § 95, p. 137.) It is proper to insert in an assignment a clause excepting exempt property from its terms. (Burrill on Assignments, 137, 138; 4 Lawson's Rights, Remedies, and Practice, § 1988, p. 3388, note 12; *Richardson* v. *Marqueze*, 59 Miss. 80; 42 Am. Rep. 353.)

De Witt, J.—This is an action in the nature of ejectment, in which plaintiff recovered judgment. A motion for a new trial was denied. From this order, and from the judgment, defendant appeals.

Respondent contends that the order denying the new trial cannot now be reviewed, because the notice of motion was not filed in time. But we may pass this contention, because the only point made upon the motion for a new trial is also properly preserved in a bill of exceptions; thus becoming part of the judgment-roll, and reviewable on the appeal from the judgment. That point is as follows: Plaintiff relied for title to the premises in controversy upon a deed of general assignment for the benefit of creditors made by Bennet Price, defendant, to S. E. Atkinson, as his assignee, said Atkinson

afterwards conveying to plaintiff. When the deed of assignment was offered in evidence as part of plaintiff's chain of title defendant objected to it upon two grounds. His objections were overruled. He excepted, and now urges error in this respect.

The first objection was that, in the deed of assignment, the description of the property was insufficient to pass the title to real estate. The instrument was executed by this defendant and J. H. Jurgens and wife. The granting and descriptive portion of the deed of assignment is as follows: "Said parties have," etc., "and by these presents do grant, bargain, sell, assign, transfer, and set over to," etc., "all and singular, the lands, tenements, hereditaments, and appurtenances, goods, etc. [describing personal property], of every description, belonging to the said parties of the first part, or either of them, or in which they, or either of them, have any right or interest . . . . and wheresoever said property, or any part thereof, may be situated."

This description, appellant contends, is insufficient, as being too general. He does not cite us to any authorities supporting his contention. The description is of all the lands of this appellant, of every description, belonging to him, wherever situated.

The United States supreme court said in *Wilson* v. *Boyce*, 92 U. S. 325: "The question is, Does the word 'property,' in the statute, create a valid lien on these lands? The generality of its language forms no objection to the validity of the mortgage. A deed 'of all my estate' is sufficient. So, a deed 'of all my lands, wherever situated,' is good to pass title. (*Jackson* v. *De Lancey*, 4 Cow. 427; *Pond* v. *Bergh*, 10 Paige, 140; 1 Atkinson on Conveyancing, 2.) A mortgage 'of all my property,' like the one we are considering, is sufficient to transfer title."

We also cite as follows from *Pettigrew* v. *Dobbelaar*, 63 Cal. 396: "Appellant also urges that the second deed from Harvey to Lacey contains no description, and is void. The descriptive clause is, 'All lands and real estate belonging to the said party of the first part, wherever the same may be situated, together,' etc. If the lands in controversy belonged to Harvey they

passed by the deed last mentioned. (*Lick* v. *O'Donnell*, 3 Cal. 59; 58 Am. Dec. 383.)"

In the case at bar there is no question but the lands belonged to Price when the assignment was made. The contention in this case is between assignor and assignee's grantee. There is no claim that this general description attempted to cover any fraud, or was likely to work any fraud. There is no reference to any schedule to limit the general description. Under all these circumstances, there can be no doubt that the description of the premises was sufficient. (*Frey* v. *Clifford*, 44 Cal. 343; *Brown* v. *Warren*, 16 Nev. 237; *Prettyman* v. *Walston*, 34 Ill. 175; *Kellogg* v. *Slawson*, 15 Barb. 58; *Harmon* v. *James*, 7 Smedes & M. 111; 45 Am. Dec. 296; *Strong* v. *Lynn*, 38 Minn. 315; *Jackson* v. *De Lancey*, 11 Johns. 365; 6 Lawson's Rights, Remedies, and Practice, § 3017, p. 4889; 1 Jones on Mortgages, § 65; Burrill on Assignments, 5th ed., § 95.)

The second objection made to the introduction in evidence of the deed of assignment was that it was void for uncertainty, in that it provides that certain exempt property shall be excepted from the operation of the deed, which exempt property is uncertain in amount. To the descriptive part of the deed, which we have quoted heretofore in this opinion, is added the clause, "Except what are exempt to them (the first parties), or either of them, from execution, by the laws of Montana Territory."

Appellant cites us to no authority holding that such exception renders the deed of assignment void, nor does he suggest any reasons why it should be so held. It was, indeed, so held in Tennessee; but the Tennessee decisions were reviewed, and, as we think, their reasons refuted, in *Richardson* v. *Marqueze*, 59 Miss. 80, 42 Am. Rep. 353, in which case the court says, after speaking of the Tennessee cases:

"But we dissent from them, in thinking that a failure specifically to describe the exempt property renders the conveyance void for uncertainty. If it has any evil effect whatever, manifestly, it must be to render void the claim for exemption, and to cause a forfeiture of such claim. It is the exception or reservation that is insufficiently described, and thereby left uncertain and void, while the conveying words of the instrument, being

definite, and embracing all the property of the grantor, must be operative to pass it all. The rule is well settled that in order to except certain property out of a conveyance, which without the exception would carry all, the words of exception must be as definite as those required to convey title, and that if they are not so the whole property passes. An exception must be a part only of the thing granted; must be a particular thing out of the general one, and must be described with certainty. (Coke on Littleton, 142 *a*.) In a grant of land, excepting one and a half acres, the exception is void for uncertainty, and the title to the whole passes to the grantee. The language both of grants and of exceptions is to be taken strongly against the grantor. (*Darling* v. *Crowell*, 6 N. H. 421, and cases cited.) We agree, however, with the supreme court of Michigan, in *Smith* v. *Mitchell*, 12 Mich. 180, that a reservation of exempt property, without a minute specification of it, neither avoids the deed, nor is void in itself for uncertainty. That is certain which may be made certain. The law fixes the amount of the exemption, and points out the mode of its ascertainment. It was remarked by the court, in the case last cited, that 'a *bona fide* selection is as practicable here as under a levy.' We are not aware that officers holding executions or attachments ever experience any difficulty in finding out what is and what is not exempt by law to the debtor; and this, it would seem, can be as readily done by an assignee under a general assignment. Where the right of selection resides in the debtor, he can easily be made to exercise it, or forfeit it; and to compel him to do so would seem far more reasonable than to declare a conveyance embracing thousands of dollars' worth of property void, because of the failure accurately to enumerate and describe the two mules, or the four cows and calves, that he claims as exempt."

The authorities are with the view expressed in the Mississippi case. (See cases therein cited; also, Burrill on Assignment, 5th ed., § 96, p. 142; 4 Lawson's Rights, Remedies, and Practice, § 1988, p. 3388, and cases cited in these textbooks.) Whatever was said in *Goll* v. *Hubbell*, 61 Wis. 293, following the Tennessee cases, and looking to appellant's view of this matter, was abandoned upon a rehearing of the case

(*Goll* v. *Hubbell*, 61 Wis. 300), following the case of *First Nat. Bank* v. *Hackett*, 61 Wis. 336.

We are therefore of opinion that the objections to the deed of assignment were properly overruled. The judgment is therefore affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

RAUSCH, APPELLANT, v. RAUSCH, RESPONDENT.

[Submitted February 26, 1894. Decided April 9, 1894.]

ESTOPPEL—*Equitable title—Dower.*—A wife who administers upon the estate of a husband, to whom she supposed she was lawfully married, and returns as belonging to him property which he had purchased with her money, wrongfully taking the title in his own name, and allows the same to be set apart by the court as her homestead, is not thereby estopped from asserting an equitable title to the property as against the lawful wife seeking to enforce a dower right therein.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to enforce dower. The cause was tried before BUCK, J. Defendant had judgment below. Affirmed.

McConnell, Clayberg & Gunn, for Appellant.

I. The respondent having petitioned the probate court to have the property in controversy set apart to her as a homestead, and said petition having been granted and an order of the probate court having been made setting said property apart to her as a homestead, she cannot now be heard to say that George Rausch was not seised and possessed of said property in his own right at the time of his death. The probate court must have found before making said order that said property was a part of the estate of George Rausch, deceased, and the respondent is concluded by this finding. "Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words." (2 Black on Judgments, § 613.) Under the statutes of this

state, the court is only authorized to set apart as a homestead property belonging to the estate. The respondent having presented proof by her verified petition invoked the adjudication of the court that this property was a part of the estate of George Rausch, deceased, and obtained an order based on this fact she is now estopped from asserting otherwise. (*McDonald* v. *Rainor*, 8 Johns. 442; 2 Black on Judgments, § 632.) Orders of the probate court are conclusive of the facts found and of the facts necessary to the making of said orders. (2 Black on Judgments, § 633.) The respondent upon the plainest principles of justice and under all the decisions is estopped by the said order of the probate court made in her favor, and obtained upon her petition from disputing the facts upon which said order rests and necessary to the making thereof.

II. The respondent having stated in the probate court, under the solemnity of an oath, that this property was the property of another whose estate she was administering upon; and this same property having been appraised as the property of said estate, upon her application; the respondent having gone still further and asked the court to set apart this property to her as a homestead, and claimed she was entitled to it out of the property of George Rausch, deceased, and an order having been made setting said property apart to her as a homestead upon her petition, and she having taken the benefits of said order, she is now estopped from claiming it as her separate property. The respondent's previous conduct and her assertions are wholly inconsistent with the fact that this property was her own individual and separate property, or that George Rausch held it in trust for her. An administratrix who finds property among the assets of an estate and takes possession of it as the property of the estate, laying no claim to it herself, is estopped from setting up her claim adverse to the estate. (*Miller* v. *Jones*, 26 Ala. 247; *Manigault* v. *Deas*, 1 Bail. Eq. 283; Bigelow on Estoppel, 3d ed., 435; *Benjamin* v. *Gill*, 45 Ga. 110; 2 Herman on Estoppel, § 1125, p. 1261, and numerous cases cited in note.)

III. The respondent having accepted this property as a homestead under said order of the probate court, and having

gone into possession, and continuing to hold the same, as found by the court, is estopped from asserting a title paramount to that of the estate. (*Phelan* v. *Kelley*, 25 Wend. 389; *Jackson* v. *Streeter*, 5 Cow. 529; 2 Devlin on Deeds, 1289.) The court having found that the appellant was the lawful wife of George Rausch, deceased, at the time of his death we respectfully submit that under the other findings of fact made by the court said appellant is entitled to her dower interest in said property. The right of the wife to dower in the lands of which her husband was seised during coverture is given by the Act of February 11, 1876, and affirmed by the supreme court in *Chadwick* v. *Tatem*, 9 Mont. 354.

George F. Shelton, for Respondent.

I. The plaintiff forfeited her right to dower by the fact that she and said George Rausch separated in 1861, and in 1878 she married again, not having met or cohabited with her first husband after such separation. If a woman leaves her husband of her own free will, and afterwards lives in adultery, the dower is forfeited. (2 Scribner on Dower, 533 et seq.; *Hetherington* v. *Graham*, 6 Bing. 135; *Woodward* v. *Dowse*, 10 Com. B., N. S., 722.) The statute, 13 Edw. 1, 34, commonly called the statute of Westminster the 2d, upon which the above decisions are based, has been recognized as a part of the American common law, when no re-enactment has been made in terms. (*Bell* v. *Nealy*, 1 Bail. 312; 19 Am. Dec. 686; *Reel* v. *Elder*, 62 Pa. St. 308; 1 Am. Rep. 414.) The common law of England has been adopted by express enactment in Montana. (Comp. Stats. 647.) The common law as adopted by the legislature of Montana included such British statutes of a general nature not local to that kingdom or not in conflict with the constitution or laws of the United States, nor of the territory as were in force at the time of the independence of the United States. (*Bent* v. *Thompson*, 138 U. S. 114; *Wilson* v. *Davis*, 1 Mont. 193.) The principle that a wife who voluntarily leaves her husband and lives in adultery with another man cannot be heard afterwards to claim an interest in his estate by the application of a doctrine analogous to that of equitable estoppels has been uniformly recognized

by the courts. (*Arthur* v. *Israel*, 15 Col. 147; 22 Am. St. Rep. 381; *Duke* v. *Reed*, 64 Tex. 705; *Prater* v. *Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623; *Odiorne's Appeal*, 54 Pa. St. 175; 93 Am. Dec. 683; *Garner* v. *Garner*, 38 Ind. 139.)

II. The doctrine of estoppel invoked by appellant is without foundation in law or fact. It is claimed that respondent is estopped by the inventory and petition to set aside homestead from asserting title in herself. That there is no merit in this contention is established by numerous and well-considered authorities. (*Anthony* v. *Chapman*, 65 Cal. 73; *In re Bauer's Estate*, 79 Cal. 311; *Baker* v. *Brickell*, 87 Cal. 342; *Haley* v. *Gatewood*, 74 Tex. 281; *Carter* v. *McManus*, 15 La. Ann. 676; *Werkheiser* v. *Werkheiser*, 3 Rawle, 326.) The doctrine of estoppel is based upon the principle that some one will be legally injured by permitting another to speak the truth, but inasmuch as appellant could, under no conceivable state of facts, have any greater or better title than George Rausch, and as he had no title at all as against respondent, appellant has suffered no injury and respondent has only received tardy justice.

HARWOOD, J.—This case involves a claim by plaintiff to a dower interest in certain lands situate in Helena, Lewis and Clarke county, in the possession of defendant, who claims to be the sole and exclusive owner thereof. On the trial of the action in the district court findings of fact were made, and thereon judgment was entered in favor of defendant, in effect adjudging that plaintiff had made out no right of dower in the premises in question; and therefore adjudging defendant's title quieted as against said claim of plaintiff. Plaintiff appealed from the judgment, insisting, in this court, that, according to the findings of fact, the judgment should have been rendered in her favor, establishing her claim of dower in said premises.

In brief, the facts as presented by the findings are as follows: That plaintiff and George Rausch were married in Austria, August 28, 1847; that about five years thereafter George immigrated to America, where he was joined later by plaintiff, his wife; they lived together in Milwaukee, Wisconsin, some time, and afterwards in Denver, then territory of Colorado,

where, in the year 1861, these spouses separated, as found by the court, each apparently going his and her own way, as subsequent events seem to imply, to seek their fortunes respectively, independently of one another, and, as the findings recite, never met again. The findings further show that George Rausch came to Montana, and in the course of events, about the year 1868, married the woman who is defendant in this action, representing to her that his former wife was dead, and that there was no legal impediment to his marriage with Eliza, this defendant; that the latter marriage was solemnized by a priest of the Roman Catholic church, in the city of Helena, then territory of Montana; that at the time of this marriage, as the findings show, defendant Eliza Rausch was possessed of money of her own earnings, acquired prior thereto, to the amount of about two thousand two hundred and fifty dollars, and that said George Rausch, at the time of his marriage with Eliza, had nothing in the nature of money or property, not even sufficient means for his own maintenance, and after such marriage he was supported entirely by the property and earnings of defendant, Eliza, until his death, which occurred in September, 1887; that, on a certain occasion after said last-mentioned marriage, defendant, having concluded to buy the property in question, delivered to said George Rausch, out of her own funds, money sufficient to purchase the same, with direction to purchase it and have the title conveyed to her name, which he promised to do; that said George Rausch with such funds purchased the property in question from the probate judge holding, as trustee, the townsite of Helena, but caused the title of said property to be conveyed to him, the said George Rausch, instead of defendant, contrary to the express agreement between said George and Eliza when the money was delivered to him to buy said property; that some time afterwards, when defendant discovered that the title had been placed in the name of George Rausch, she was assured by him that it was all right; that defendant was unable to read or write, and was ignorant as to her legal rights in the premises; and the title to said property remained in the name of George Rausch until he died in 1887. Upon his death, administration proceedings were had as to said property in his name, and, among other things, the prop-

erty in question was, by order of the probate court having jurisdiction thereof, set apart to defendant as her homestead, she then being the supposed wife of the deceased, George Rausch.

While these events were transpiring in reference to the history of George Rausch, the plaintiff in this action, Johannah Catherine Rausch, as appears from the findings, sought also to carve out her fortune in the great western hemisphere, independently of George, her husband, and, among other events, at Laramie City, Wyoming, entered into marriage bonds with one Patrick G. Murphy, and lived with him in that relation about seven years, when she obtained a divorce from him in the courts of that jurisdiction, on the ground of his desertion and failure to support her.

Now, after all these events, and after the death of Rausch, plaintiff asserts her claim to dower right in said property, purchased with defendant's money, in the city of Helena, and has instituted this action to enforce such dower claim. Defendant Eliza, in opposition thereto, set up, not only the proceedings setting said property apart to her as her homestead by order of the probate court, but also alleging her equitable right to said property by reason of its having been purchased with her money as aforesaid; all of which facts are found, and are admitted to be true as the case now stands. But plaintiff's counsel insist that defendant, having administered on the estate of George Rausch, and returned said property in the lists as property belonging to his estate, and having allowed the same to be set apart as her homestead, under her supposed right as the wife of George Rausch, is thereby estopped from now asserting that said property was not, in fact or in equity, the property of George Rausch, but that she was, and still is, the equitable owner thereof, independently of her supposed relation to Rausch by marriage.

The estoppel proposed to bar the assertion of defendant's equitable right to said property cannot be maintained. The position taken by plaintiff's counsel throughout the argument of this case is that defendant was never the lawful wife of Rausch; that her marriage with him was void in law. But that she was deceived and acted innocently, and without knowledge of any legal impediment to such marriage, is not

disputed. Such appears to have been the view held by the trial court, and is not controverted by defendant's counsel, and there seems to be no ground upon which to question its correctness. Then, admitting that defendant was never the lawful wife of Rausch, the acts and proceedings in reference to his estate in favor of defendant, based upon the assumption that she was his lawful widow, must have been void. But those void proceedings were brought about by deception and imposition practiced upon defendant, Eliza, an innocent and injured party. That nominal marriage of George Rausch with defendant, and the proceedings based upon that false assumption, being void, what were their relations in respect to said property? It would seem to be that of one person receiving money as agent for another, and with direction and understanding that such funds should be invested in the purchase of certain property for, and the title thereto conveyed to, the party furnishing the purchasing price; but, contrary to such understanding and the right of the party furnishing the money, the agent causes the title of said property to be conveyed to his own name. Under such conditions, the legal title is held by the latter, as trustee for the former, and such trust will be enforced, to the end that the equitable owner be invested with the title of his or her own estate.

There is no principle of estoppel to bar defendant, under the conditions shown in this case, from asserting her right to said property. If so, then she is estopped by having suffered wrongs and imposition through the misconduct of others in matters wherein she was innocent and deceived; and the law of estoppel, so operating, would augment her injury. Such is not the office of estoppel. It is interposed against guilty conduct to prevent imposition, deception, and injury to others acting in good faith in reference to the same subject. Nor does it appear that any disadvantage resulted to plaintiff from the events recited. Nor is her conduct as free from question as that of defendant, against whom no suspicion of bad faith or guilty knowledge is suggested. For, as appears from the findings of fact, plaintiff not only entered into formal marriage relations with said Murphy after she and Rausch separated (although it is found that she believed Rausch dead when she

married Murphy), but "long before the death of Rausch, and prior to plaintiff's divorce from Murphy, she knew that George Rausch was alive, and was living with defendant as her husband." But there is no showing that defendant was given any information as to the relation which existed between plaintiff and said Rausch.

There is no ground shown upon which plaintiff can recover. Let the judgment stand affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concurred.

STATE EX REL. BAILEY v. COOK, STATE AUDITOR.

[Submitted April 2, 1894. Decided April 13, 1894.]

APPROPRIATIONS—*Transfer of unused portion to general fund.*—When the legislature appropriates specific sums of money for each of the two ensuing fiscal years to be used in the construction of a state prison, and only a small portion of the fund is used during the first year, the unused portion of the appropriation did not thereby lapse so as to authorize the state auditor, at the expiration of the first fiscal year, to transfer it, together with the appropriation for the second fiscal year, to the general fund of the state.

ORIGINAL PROCEEDING. Application for writ of mandate. Granted.

O. F. Goddard, for Relator.

Henri J. Haskell, attorney general, for the state, Respondent.

PEMBERTON, C. J.—On the twenty-sixth day of July, 1893, the relator entered into a contract with the prison commissioners of the state to furnish sand to be used in the building of the eastern state prison at Billings. On the seventeenth day of February, 1894, said relator presented his bill in the sum of four hundred and twenty-five dollars for furnishing said sand, to the state board of examiners, which was allowed by said board, and thereafter transmitted to said respondent, with a request for a warrant on the state treasurer for said sum. The auditor refused to draw his warrant for said sum. Upon such refusal to draw his warrant the relator makes this appli-

cation to this court for a writ of mandate to require said auditor to draw said warrant for said claim.

By the act of March 3, 1893 (Laws 1893, § 15, p. 197), forty-two thousand dollars were appropriated for the year 1893, to be used in the construction of said eastern prison, and thirty thousand dollars appropriated for the same purpose for the year 1894. It seems that only nine dollars of said fund was actually used and paid out in the fiscal year 1893. The auditor contends that he is not required to draw his warrant for the claim of relator, for the reason that the unused balance of said appropriation of forty-two thousand dollars was, on the first day of December, 1893, that being the day on which the fiscal year of 1893 ended, by law transferred to the general fund of the state, and that as the whole amount of said appropriation for the year 1893 was not used and paid out during said year, and was for that reason so transferred to the general fund, and thirty thousand dollars appropriated for the year 1894 was also transferred to the general fund on the first day of December, 1893, and that there is therefore no appropriated fund on which he can draw his warrant to pay relator's claim. We do not think this position tenable. The appropriation involved is for a specific purpose, and is for two years. We think the appropriation in question, being for two years, is subject to any demands and liabilities that may be incurred by the state's agents during the whole period that it was intended by the legislature that it should continue. Any other construction would prevent the state's paying its legal obligation, and embarrass it in carrying out the public enterprises contemplated by the legislature in enacting such appropriation laws. This view has been held in other jurisdictions under similar constitutions and laws to ours. (See *People* v. *Needles*, 96 Ill. 577; *People* v. *Swigert*, 107 Ill. 494.)

We think the contention of respondent that said appropriation or any part thereof lapsed on the first day of December, 1893, the end of the fiscal year for 1893, and was lawfully transferred to the general fund on that day, is not supported by authority or any legitimate construction of the laws of this state.

It is therefore ordered that a peremptory writ of mandate

issue in this case, requiring said auditor to issue his warrant, in accordance with the application of the relator.

Granted.

HARWOOD and DE WITT, JJ., concur.

LOGAN, RESPONDENT, v. RICKARDS ET AL., APPELLANTS.

[Submitted April 9, 1894. Decided April 16, 1894.]

APPEAL—*Dismissal—Findings—Briefs.*—An appeal will not be dismissed for failure of appellants to except to findings or to ask for further findings; nor to file briefs within the time required by the rules of this court.

Appeal from Ninth Judicial District, Gallatin County.

ON MOTION to dismiss appeal. Denied.

E. P. Cadwell, for the motion.

Hartman & Hartman, contra.

Per CURIAM.—Respondent's motion to dismiss appeal herein should be overruled.

1. As to the failure of appellants to except to findings, or to ask for further findings, that is a matter to be considered on submission of the appeal for determination. Moreover, there may be other matters relating to the judgment-roll, which appellants may, if desired, have reviewed; and we cannot assume at the present time that the findings, or want of findings, will be the only question presented on such appeal.

2. As to the specification that briefs have not been filed by appellants within the time required by the rules of this court, while that may be cause for summary disposal of the appeal there has, so far, been no rule adopted providing for the dismissal of appeals for failure to file briefs within the time prescribed.

Motion denied.

GOULD, ET AL., RESPONDENTS, v. BARNARD, APPELLANT.

14 335
26 482

[Submitted October 16, 1893. Decided April 16, 1894.]

NONSUIT.—After the overruling of a motion for nonsuit plaintiff's case is entitled to any support supplied by the evidence offered on behalf of the defendant. (*Sweeney* v. *Great Falls etc. Ry. Co.*, 11 Mont. 531; *McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15, cited.)

MECHANIC'S LIEN—*Subcontractors.*—In an action by subcontractors to foreclose a lien, proof that the owner paid the contractor without showing that the subcontractors received payment is insufficient to defeat the lien, as the owner in order to protect his property should have seen that the subcontractors were paid for their work within the contract price.

Appeal from Second Judicial District, Silver Bow County.

ACTION to foreclose mechanic's lien. Judgment was rendered for the plaintiffs below by MCHATTON, J. Affirmed.

Robinson & Stapleton, for Appellant.

Forbis & Forbis, for Respondents.

Per CURIAM.—The record herein presents a singular case. The action was brought to enforce payment of $345.60 for certain plumbing alleged to have been done in defendant's building, situate in the city of Butte, Montana, by foreclosure of a mechanic's lien on said building. The controversy centers upon the plumbing done in fitting rooms in said building to be occupied by Dr. Murray. It appears that the block was rebuilt, after destruction by fire, by J. W. Lambourn, contractor and builder, under a contract with defendant, Barnard, the owner of said property; that such contract provided for the construction of said block, with certain plumbing to be done therein, which building contract, according to the testimony of defendant, contemplated and included the plumbing, which is the subject of controversy in this suit. It further appears that plaintiffs were contracted with by said Lambourn to do certain other plumbing in said building, under two special contracts, one of which called for plumbing to the amount of $790, and the other called for plumbing to the amount of $465. In their complaint plaintiffs set forth three items of plumbing—the first two above mentioned, and the

third item of $345.60—and admit payment of the first two, and seek to enforce payment for the third item by this action, by foreclosure of the lien which it appears they filed upon said property. Defendant denies that the value of said third item of plumbing exceeded $100, and also alleges that the same was included and paid for in the plumbing comprised in the contract above mentioned, for which $790 were paid.

The jury impaneled to try the issue involved returned their verdict in favor of plaintiffs, and judgment was rendered accordingly, foreclosing their lien. The case is here on defendant's appeal from the order denying his motion for new trial on the assignment that the evidence is insufficient to support the verdict; appellant's counsel insisting that there is no evidence to support the finding that the plumbing here in controversy was done under, or by virtue of, any contract.

We are inclined to the opinion that it might have been necessary to sustain appellant's contention, had the want of a contract or authority to do said work been made an issue, and defendant's counsel had rested their case upon their motion for nonsuit interposed at the close of plaintiffs' testimony; for the record, up to that point, hardly presents sufficient evidence to support a finding in favor of plaintiffs. The weakness of the case, up to that point, lies in the failure to show, substantially, an express or implied contract on the part of defendant, or his builder, Lambourn, with plaintiffs, to do the plumbing in question. But defendant did not rest on his motion for nonsuit, and his position was never so strong afterwards. The testimony which he introduced, we think, materially cures the weakness of plaintiffs' showing, and they are entitled to any support supplied by the evidence offered on the part of defendant after the motion for nonsuit was overruled. (*Sweeney* v. *Great Falls etc. Ry. Co.*, 11 Mont. 531; *McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15.)

It is shown by the evidence offered by defendant that the plumbing in controversy was done in fitting up said rooms for Dr. Murray, as provided in the contract between defendant, Barnard, and Lambourn, contractor, to erect and finish said block. Defendant, Barnard, asserts this in his testimony; and the same is asserted in the deposition of Lambourn, introduced

on behalf of defendant, with the qualification, according to Lambourn's statement, that such plumbing exceeded that called for in the building contract by one item. The same is further shown by the testimony of Perry on behalf of defendant, to the effect that he, along with defendant, on the completion of said building, went through it, and checked up the items of plumbing, to see whether the same had been done as required by the terms of the building contract with Lambourn, and that they found such plumbing, including that in the rooms for Dr. Murray, done satisfactorily, according to the terms of said contract. Therefore, it appears that this plumbing in controversy was not work or expense put upon said building in excess of that contemplated by the building contract; and it also follows that said contractor, Lambourn, pursuant to the terms of the building contract, was obliged to do, or cause to be done, the plumbing in said rooms, as it was found by the owner in checking the work over. The evidence introduced on behalf of defendant shows that both the contractor, Lambourn, and Barnard were present every day during the construction and plumbing of said building, superintending the same. Now, as observed above, the evidence offered in the case is obscure, as to showing any special contract to do this particular plumbing, but the amount of a contract, expressed or implied, to do the plumbing in said rooms, was not the real issue presented by defendant's answer. The answer does not deny that plaintiffs had authority to do said plumbing. The issue tendered is, as before stated: 1. That the value of said plumbing does not exceed $100; and 2. That it was paid for in the item of $790 paid to plaintiffs for certain plumbing in said building, as aforesaid. The answer does not controvert the fact that plaintiffs had express or implied authority to do the plumbing in controversy. The controversy is therefore narrowed down, according to the pleadings, to the question whether said plumbing was of the reasonable value alleged by plaintiffs, and whether it had been paid for, on both of which issues the evidence offered by defendant hardly raises a substantial conflict.

The case made out shows that defendant contracted with Lambourn to have said plumbing in the rooms to be occupied by Dr. Murray done along with the rest of the plumbing called for in the building contract, and that defendant paid Lambourn therefor. But that plaintiffs received payment for said plumbing is not shown. As the lien law now stands in this state, in order to protect his property against this lien, Barnard should have seen to it that the subcontractors were paid for work done, within the contract price. The building is therefore liable to a lien therefor. Order denying a new trial affirmed.

Affirmed.

All concur.

MAY, RESPONDENT, v. HILL ET AL., BRANAGAN ET AL., INTERVENORS, APPELLANTS.

[Submitted September 11, 1893. Decided April 2, 1894.]

ASSIGNMENT OF DEBT—*Notice—Priority as against attachment.*—Notice to a firm of the assignment of a debt due by it is sufficiently shown by proof that the assignee left with the person in full charge of the firm's business a written order for the claim which was retained by such person with an understanding of the situation, so as to give such assignee priority over a creditor of the assignor who garnished the firm after such notice. But *quære*, was proof of such notice material?

Appeal from Fifth Judicial District, Jefferson County.

ACTION by assignee of debt. Attaching creditor intervenes and defends. Judgment was rendered for plaintiff below by GALBRAITH, J. Affirmed.

Statement of the case by Mr. Justice DE WITT.

In October, 1891, Hill *et al.*, defendants, were indebted in the sum of two hundred and ninety-seven dollars and eighty-six cents, to one O. Rivard. This action is brought by the plaintiff, May, against Hill *et al.*, alleging that this indebtedness from defendants to Rivard had been assigned to May, the plaintiff, for a valuable consideration. The indebtedness claimed in the complaint was three hundred and ninety-five dollars. Defendants filed an answer, in which they admit an

indebtedness of two hundred and ninety-seven dollars and eighty-six cents. They further state that John Branagan *et al.* have garnished this money in an action by them against Rivard. By consent, defendants retired from the litigation after paying the money into court, and Branagan *et al.* filed an answer, and became defendants. It is not necessary to recite their answer in full. It is sufficient to state that the contention upon the trial was between the plaintiff, May, claiming the funds in the hands of Hill *et al.* by virtue of Rivard's assignment of the same to him, by order drawn upon Hill *et al.*, and Branagan *et al.*, claiming the same funds by virtue of a garnishment served upon Hill *et al.* in a suit of Branagan *et al.* against Rivard. The jury found for the plaintiff for the amount of money theretofore paid into court by Hill *et al.* The defendant intervenors moved for a new trial, which motion was denied. From the order and the judgment the intervenors appeal.

Cowan & Parker, for Appellants.

DE WITT, J.—It was specified in moving for new trial that the evidence did not show an assignment of the indebtedness by Rivard to May. But this specification is not pressed, and indeed it could not be plausibly urged in face of the record in this case. There was ample testimony of the existence, about October 13th to 20th, of the indebtedness from Hill *et al.* to Rivard. It was in evidence, uncontradicted, that Rivard was indebted to May in a sum equal to or more than the debt from Hill *et al.* to Rivard, and that, in consideration of this indebtedness, Rivard assigned and transferred to May, by written order, the debt of Hill *et al.* to him (Rivard). It was also specified that the evidence was insufficient, in that it did not show that any notice of the assignment and transfer from Rivard to May was given to Hill *et al.* prior to the service of garnishment in the case of Branagan *et al.* against Rivard. It was assumed by counsel, and the case was tried by the court upon the theory that notice of the assignment from Rivard to May was material. We will regard the case from this point of view of the court below.

The record shows that Hill *et al.* were a firm, under the name of Hill, Logan & Co., composed of George H. Hill, William R. Logan, and Theodore H. Kleinschmidt. They were conducting a wood business and store. Their headquarters, office, and store were in the neighborhood of the railroad station of Bernice. Kleinschmidt and Hill took no active part in the business, and never came to the place at all, except for an occasional visit. Logan came sometimes. One Martenstein was in charge of the store, and keeping the books and accounts of the firm. Somewhere from the 13th to the 21st of October, and before Branagan's garnishment of Hill *et al.*, May went to the Hill store, and gave to Martenstein, the bookkeeper, and left with him, the written order by Rivard upon Hill *et al.* to him (May). He told Martenstein that, by virtue of said written order, he claimed the money due from Hill, Logan & Co. to Rivard. Martenstein perfectly understood his claim, and retained the order. At that time Hill and Kleinschmidt were not about the business, nor was Logan there for some ten days during this period. In fact, Martenstein, was the only person in charge of the place, and the only person about connected with or representing the firm.

It is said by appellant that this book-keeper disclaimed any authority. All that the book-keeper disclaimed was authority to give a written acceptance of the order. It is a matter of no materiality in this case whether the book-keeper accepted the order or not. We do not understand how May could have possibly given this order, or notice of its existence, to Hill, Logan & Co., in any other way than he did. He took it to their recognized place of business, where all their affairs out of which this account grew were conducted. He gave it to the person in full charge of that business, when the fact was that two members of the firm were never there, and one member was seldom there, and was upon a long absence at the time of May's visit. It was simply a matter of giving the notice as he did, or not giving it at all. We are of opinion that, if it were necessary in this case to prove notice to Hill, Logan & Co. of the assignment from Rivard to May, there was evidence of the notice ample to sustain the verdict.

Appellants in their brief contend that the order from Rivard to May is tainted with fraud. But this question is not raised by specification or by issue in the pleadings.

The appellants contend that there were certain errors committed in the instructions, but their contention in this respect is in the same line as their specification as to the insufficiency of the evidence to sustain the verdict. We have shown that the evidence was amply sufficient, and we are also of opinion that the instructions very properly presented the case, under the evidence, to the jury.

The judgment of the district court, and the order denying new trial, are affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

SELL, APPELLANT, v. GRAVES, RESPONDENT.

[Submitted March 30, 1894. Decided April 16, 1894.]

NEW TRIAL—*Filing statement.*—A statement on motion for a new trial which was not filed after settlement as required by subdivision 3 of section 298 of the Code of Civil Procedure will not be stricken from the record on appeal where it was filed with the clerk before settlement, used upon the hearing of the motion, and thereafter remained as a file of the court.

SAME—*Settlement of statement.*—A statement on motion for a new trial will not be stricken from the record upon the alleged ground that it was not presented to the judge who tried the case, or delivered to the clerk for the judge to settle and sign within ten days after service of the proposed amendments, where it appeared that after the statement and amendments thereto were filed both were presented to the judge and settled in the presence of respective counsel.

SAME—*Settlement of statement—Waiver of objection.*—The appearance and taking part in the settlement of a statement on motion for a new trial by counsel for respondent constitutes a waiver of objection to the sufficiency of appellant's notice of intention to apply for the settlement thereof.

Appeal from Tenth Judicial District, County of Flathead.

ON MOTION to strike from the record the statement on motion for a new trial. Denied.

McIntire & Clinton, for Appellant.

Sanford & Grubb, and *Walsh & Newman*, for Respondent.

Per CURIAM.—Respondent moves this court to eliminate from the record the statement on motion for new trial:

1. Because the statement was not filed after the same was settled and allowed by the judge who tried the action. The motion cannot be sustained on this ground, because it appears from the statement that the same was filed with the clerk immediately after being prepared and served. Thereupon, respondent filed amendments, and thereafter, as the record shows, the court, with both counsel present, and after hearing their arguments, "settled said statement on motion for new trial, as being full and correct, and duly signed the certificate in accordance therewith." While the record does not show that the statement was refiled with the clerk after being settled it does show the filing of the statement and amendments with the clerk before the statement was settled and afterwards the motion for new trial was heard thereon. The statement on motion for new trial should be filed after settlement. (Code Civ. Proc., § 298, subd. 3.) But in this case the statement was filed before it was settled, and the tendency of all the proceedings shows that it remained with the clerk, as a file of the court, from the time it was first filed until it was settled, and the motion for new trial heard thereon, and still remains as such file. Under such state of facts, all the point amounts to is that the statement was filed before instead of after settlement, and this irregularity we think insufficient, as ground for striking out the statement.

2. Respondent urges the elimination of the statement on motion for new trial from the record because the same "was not presented to the judge who tried the cause, or delivered to the clerk for the judge to settle and sign, within ten days after service of the proposed amendments." On this point, as before recited, the record shows that the statement, after being prepared and served, was filed with the clerk, and amendments were proposed thereto by respondent, and filed with the clerk; and thereafter, as the record discloses, the same were presented to the judge and settled, counsel for both parties being present. Under these circumstances, how it can be maintained that the statement and amendments were not "delivered to the clerk of the court for the judge" we are unable to conceive. The record shows that both the statement and the amendments,

from the time of their preparation, were filed with the clerk, and, in due course, were presented to the judge. There is no merit, on that alleged ground, for striking out the statement.

The third ground on which respondent moves to strike the statement on motion for new trial from the record is that appellant failed to give respondent five days' notice of his intention to apply to the judge who tried the cause to settle the statement. This ground of objection to the statement loses its force, in view of the disclosure of the record that respondent's counsel appeared, and took part in the settlement of the statement, on motion for new trial.

The motion of respondent to strike out the statement on motion for new trial will, therefore, be overruled.

Motion overruled.

All concur.

THOMAS KANE AND COMPANY, APPELLANT, v. DOWNING, RESPONDENT.

[Submitted October 6, 1893. Decided April 16, 1894.]

SUBSCRIPTION TO FUND—*Liability of delinquent subscriber—New promise.*—A delinquent subscriber to a fund for the construction of an opera-house is liable in an action brought to enforce payment of his subscription without proof on the part of the plaintiff that some liability was incurred pursuant to defendant's repeated promises to pay, made subsequent to his subscription, where the action was based, not upon such subsequent promises, but upon his original subscription.

SAME—*Same—Evidence.*—Evidence that when a delinquent subscriber signed a subscription list the cost and character of the building contemplated was fully explained to him, and that the trustees proceeded with the completion of the enterprise, relying upon the subscription of defendant and others, is proper where defendant pleaded that his subscription was intended for a less expensive enterprise.

Appeal from Eighth Judicial District, Cascade County.

ACTION to recover delinquent subscription to a fund. The cause was tried before BENTON, J. Defendant had judgment below. Reversed.

Ed L. Bishop, for Appellant.

I. The defendant does not claim to have revoked his subscription, if at all, prior to the time the opera-house company,

relying upon the same, with others, had let the contract for the building of the opera-house and incurred liability thereby to an amount exceeding the total of the subscriptions. No payee being named in the subscriptions in question, the defendant's subscription constituted a continuing offer to pay the same to any person who accomplished the object of the subscription. "They who advanced money, did work, or furnished materials, were proper promisees or payees," and the Great Falls Opera House Company, by accepting the subscriptions in question and building the opera-house, became the payee to whom the promise was made, as if made to it by name. (*McClure* v. *Wilson*, 43 Ill. 356; *Hall* v. *City of Virginia*, 91 Ill. 535; *Robertson* v. *March*, 3 Scam. 198; *Pryor* v. *Cain*, 25 Ill. 292; *Miller* v. *Ballard*, 46 Ill. 379; *Griswold* v. *Trustees of Peoria University*, 26 Ill. 41; 79 Am. Dec. 361; *Swain* v. *Hill*, 30 Mo. App. 436; *Comstock* v. *Howd*, 15 Mich. 241; *Thompson* v. *Page*, 1 Met. 569; *Homes* v. *Dana*, 12 Mass. 190; 7 Am. Dec. 55; *Farmington Academy* v. *Allen*, 14 Mass. 172; 7 Am. Dec. 201; *Bryant* v. *Goodnow*, 5 Pick. 228; *University of Des Moines* v. *Livingston*, 65 Iowa, 202.)

II. The organization of the Great Falls Opera House Company and the uniting therein as stockholders of the subscribers, for the purpose of collecting the subscriptions in question and building the opera-house, constituted the company the common representative, agent, or trustee for the entire body of the subscribers to carry out the object of the subscriptions. (*Swain* v. *Hill*, 30 Mo. App. 436; *Edinboro Academy* v. *Robinson*, 37 Pa. St. 210; 78 Am. Dec. 421; *Shober* v. *Lancaster County Park Assn.*, 68 Pa. St. 431; *Gibbons* v. *Grinsell*, 79 Wis. 365; *Marysville etc. Co.* v. *Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215; *Athol Music Hall Co.* v. *Carey*, 116 Mass. 471.)

III. When the Great Falls Opera House Company accepted and proceeded to collect the subscriptions it thereby agreed to hold and appropriate the funds subscribed in conformity with the terms and object of the subscription, which implied promise could have been enforced, and thus mutual and independent promises were made which constituted a legal and sufficient consideration for each other. (*Ladies' Col. Inst.*

v. *French*, 16 Gray, 201; *Maine Central Inst.* v. *Haskell*, 73 Me. 142, 143; 26 Am. L. R. 2.) If either of the three preceding propositions are correct, the court evidently erred in instructing the jury that in order to constitute defendant's promise to pay the subscriptions to the company a waiver, they must find that the company incurred liability in the erection of the opera-house by reason of the promise, or took some action in the building of the house they would not have taken but for such promise.

IV. The admitted promise of defendant to pay to the company, knowing that it had been formed for that purpose, must be held to be a ratification of the acts of his co-subscribers, and to have the same effect as if he had consented to the organization. Defendant had ample opportunity to ascertain by reading the first subscription paper, or by inquiry, whether the opera-house to which he was subscribing was the same one of which he had talked with Gerin, and how the same was to be built, owned, and controlled. Without doing this he signed an absolute, unconditional subscription, and upon the faith of this others have not only subscribed to the enterprise, but have since paid in a large share of it; the corporation has been organized, engaged in business, expending large sums of money, upon the strength of these subscriptions in entire ignorance of the alleged misunderstandings or agreements set up in the answer, while defendant stood by to see whether it was going to be a profitable investment before coming in and claiming his interest in the enterprise. To permit defendant to release himself from liability on any such ground would be a fraud on others who have subscribed and paid for stock, and upon the corporation which has been organized and incurred liabilities in reliance upon the subscriptions. His promise being unconditional he cannot be allowed to invoke conditions. (*Haskell* v. *Worthington*, 90 Mo. 560; *Minneapolis Threshing Machine Co.* v. *Davis*, 40 Minn. 110; 12 Am. St. Rep. 701; *George* v. *Harris*, 4 N. H. 533; 17 Am. Dec. 446; *Ollesheimer* v. *Thompson Mfg. Co.*, 44 Mo. App. 182, and cases cited; *Skowhogan etc. R. R. Co.* v. *Kinsman*, 77 Me. 370.)

Leslie & Downing, for Respondent.

Per CURIAM.—This action is founded upon two certain promises by defendant to pay the sums of $200 and $100 by way of subscription to a fund for the purpose of constructing an opera-house in the city of Great Falls, Montana. These promises read as follows: "We, the undersigned, hereby subscribe and agree to pay the amounts set opposite our respective names, for the purpose of erecting an opera-house in the city of Great Falls, upon the rear 50 feet of lots 1 and 2, in block 309; said land to be subscribed at the rate of $5,000, and the building to cost $15,000,"—to which defendant subscribed $200, along with about seventy other parties, who subscribed divers sums, ranging from $25 to $2,500 each.

The second subscription to the fund, for the same purpose, reads as follows: "We, the undersigned, hereby subscribe and agree to pay the further amounts set opposite our names, for the purpose of erecting the proposed opera-house in the city of Great Falls,"—to which defendant subscribed $100; which undertakings or promises to pay are set forth in the complaint. And it is further alleged therein that pursuant to said subscription, and by the concurrence of a majority of said subscribers to the fund for said purpose, at a meeting, of which all were notified, and at which a majority of said subscribers were present, it was determined to organize a corporation, pursuant to the laws of Montana, in the name of the "Great Falls Opera House Company," to proceed in due course to build an opera-house on the land mentioned with the funds so subscribed in the subscription lists above set forth; that the various subscribers to said fund paid their subscriptions respectively, with the exception of about $2,500, delinquent, among which is that of defendant.

Plaintiff is a corporation, organized and existing under the laws of the state of Illinois, and, as alleged in the complaint, had obtained a judgment against the Great Falls Opera House Company in the sum of $757.48, and such proceedings were had as authorized plaintiff to bring this action to enforce payment of defendant's subscription to said opera-house fund.

The answer of defendant does not deny that he signed said

subscription lists, as aforesaid, but sets up two grounds of defense against the enforcement thereof: 1. Defendant alleges that, before any corporation was formed or any liability incurred in furtherance of the scheme of building said opera-house pursuant to said subscription, he revoked and rescinded his subscription thereto; 2. For further defense, he alleges that, prior to signing said subscription list, defendant, with a few other citizens of Great Falls, discussed the project of building an opera-house in said city, which should cost the sum of $6,000, exclusive of the lot on which the same should be erected; the same to be constructed and owned by the persons contemplating the erection thereof, as a copartnership undertaking, under the management of John Gerin. That the sum sued for in this action was defendant's subscription for the building of an opera-house of that character and under those conditions. But that contrary thereto, and without defendant's knowledge or consent, a corporation was formed, and obtained possession of said subscription lists which he signed, and proceeded to erect an opera-house in said city at a cost greatly exceeding $6,000, to which he had subscribed, to wit, at a cost exceeding $40,000; that, by reason of such change in the character of the company, the cost, management, and manner of carrying out said enterprise, defendant was released from the obligation entered into by said subscriptions.

The trial which ensued resulted in a verdict by the jury in favor of defendant, whereupon plaintiff moved the court for a new trial, on a statement of the case containing all the evidence introduced at the trial, and setting forth numerous specifications of error in the rulings of the court during the trial; and, further, that the evidence is insufficient to support the verdict.

The record discloses that, upon the trial, plaintiff offered proof in support of its complaint to the effect that in the spring of 1891 the project for building said opera-house was initiated by a meeting of a large number of the citizens of said city, the purpose of which was to consider the subject of building an opera-house therein; and thereat said enterprise was agreed upon and inaugurated by opening a subscription list, which was circulated and subscribed to, as above mentioned, by about 70 subscribers, in divers sums, aggregating about $18,356,

besides the site on which said building was to be erected, valued at $5,000; and thereto defendant subscribed the sum of $200. That, when he signed said subscription list the purpose thereof was fully explained to him. And thereafter, at another meeting of the subscribers, it being determined that the funds already subscribed were insufficient to erect an opera-house of the character desired, it was proposed and determined to endeavor to increase the original subscription 50 per cent. Accordingly, another subscription paper was prepared, and signed by all present, raising their original subscriptions 50 per cent, and the same being presented to defendant, with explanation of the object and purpose thereof, he signed the same in the sum of $100, increasing his original subscription 50 per cent. That immediately thereafter, at a meeting of a majority of the subscribers, a committee was appointed to organize and incorporate the Great Falls Opera House Company, and proceed with the building of the opera-house pursuant to the plans and purposes of the subscribers to said subscription lists, which was done. That the secretary of said company thereafter, on all occasions when meetings of the stockholders thereof were called, or to be held, sent written notices of such meetings to all the subscribers on said lists, including defendant; and also, from time to time, called on said subscribers for payment of certain proportions of their subscriptions, respectively, as directed by order of the trustees of said company. That, defendant being delinquent, the treasurer of said company also called on him personally, when the construction of said opera-house was considerably advanced, and requested payment of defendant's subscription, and was assured by defendant that in a few days he would call on the treasurer and pay the same in full, but, such payment not having been made, defendant was again called on personally by a collector appointed by the company to collect the delinquent subscriptions on said lists, to whom, on two occasions, defendant promised to make payment, but that he failed to pay the same.

The evidence introduced by defendant does not in any manner substantially contradict the proof offered by plaintiff. Nor is there proof offered by defendant to establish the allegation

that he rescinded or revoked his said subscriptions before the building of said opera-house was entered upon by said company, or at any other time.

As to the defense set up by defendant, that the subscriptions in question were made by him to build an opera-house, at a cost of $6,000, by a copartnership consisting of a few persons, residents of Great Falls, and to be managed by Gerin, the same should not have been considered at all, nor evidence in relation thereto admitted over the objection of plaintiff, because that defense does not controvert the allegation of the complaint or the promises on which this action is founded, set forth in said subscription lists. Nor does that defense allege facts in avoidance of those promises. The subscription list pleaded in the first instance sets forth the purpose thereof, to wit, that "we, the undersigned, subscribe and agree to pay the amounts set opposite our respective names, for the purpose of erecting an opera-house in the city of Great Falls, upon the rear 50 feet of lots 1 and 2, in block 309; said land to be subscribed at the rate of $5,000, and the building to cost $15,000"; and this subscription list was signed by defendant at the close thereof, with more than 60 names preceding his, subscribing funds aggregating over $18,000 for the purpose mentioned. Defendant does not deny that he signed that and the subsequent paper increasing his subscription thereto. Nor does he in any manner allege circumstances of deceit or fraud whereby he was induced to subscribe to that enterprise. Whatever discussion, arrangement, or determination may have been had by defendant and others as to the erection of an opera-house in said city, at the cost of $6,000, exclusive of the ground on which it was to be built, by a copartnership, under the management of Gerin, it is plain from the subscription lists on which this action is founded that the same do not contemplate such a scheme, and expressly show another, to which defendant subscribed; and defendant has failed to set up facts to avoid the same. But admitting the signing of said lists, which on their face propose a building to cost greatly exceeding $6,000, and in no manner alleging grounds to avoid his promise to pay funds subscribed thereto, defendant seeks in defense to set up the fact that, prior to subscribing to that enterprise, he had,

with others, discussed a different one; which might have been all true, but does not constitute a defense to this action. But the court allowed defendant to undertake to establish by proof that character of defense, and the same inconsistency appears in stronger light from the evidence offered by defendant, for his own proof shows that the scheme for building an opera-house at the cost of $6,000, which defendant alleges he had discussed with Gerin, the promoter and proposed manager thereof, was abandoned. Mr. Gerin, testifying on behalf of defendant, in speaking of that scheme, says: "The house originally contemplated by me, and devised, was not built. The enterprise as planned by me was not carried out." Furthermore, defendant's repeated promises to pay his subscriptions demanded in this action, when said opera-house was well advanced towards completion, contradicts the alleged defense of the revocation of said subscriptions as fictitious and unfounded in fact, and also tends to show that such subscriptions were not understood by defendant to apply to the $6,000 opera-house scheme.

We have no doubt that with proper rulings of the court as to admission of testimony consistent with the material allegations of the pleadings, and with proper instructions to the jury, a verdict would have been properly returned in favor of plaintiff, because, according to the showing of the record, no substantial defense to the action was supported by proof.

The court instructed the jury, in effect, that notwithstanding defendant's repeated promises to pay said subscriptions, while said opera-house building was in course of construction, and notwithstanding the showing on the face of the papers, and other evidence, to the effect that such subscriptions were not made in contemplation of building an opera-house at the cost of $6,000, still plaintiff must show that the opera-house company incurred some liability pursuant to such promises of defendant to pay said subscriptions, made subsequent to signing the same, or recovery could not be had. This was error. Plaintiff sued on the original promises, and no substantial defense thereto was supported by proof.

The instructions offered by plaintiff, and refused by the court, plainly and fairly stated the law applicable to the trans-

action in question, with more liberality towards defendant's alleged defense than was justified in view of the substance thereof and the want of proof to support the same. Likewise, the instructions offered by plaintiff, and given by the court, were proper and liberal statements of the law applicable to the case, as developed in the pleadings and proof, but the court erroneously modified the same by inserting therein the proposition that plaintiff could not recover unless it was shown that the opera-house company actually proceeded to incur liability, relying upon the promises of defendant to pay said subscriptions when he was called on as a delinquent, after the opera-house construction was nearly completed. So, as to the numerous assignments of error in the exclusion of testimony offered by plaintiff, such as testimony of witnesses that, when defendant signed said subscription lists, the building contemplated by the subscribers thereto, as to cost and character, was fully explained to defendant, and that the property would be bonded to raise funds, in addition to that subscribed, sufficient to erect such opera-house, and that explanation of like character was made when he signed the additional subscription list; also, the exclusion of evidence offered by plaintiff to the effect that the trustees of said company proceeded in the construction of said opera-house, relying on the subscription of the funds made by defendant and others, as shown in said subscription lists. Such evidence was proper, and should have been admitted, and we are unable to understand why the court excluded the same, in view of the pleadings in this case. The assignments of error, some twenty-six altogether, are well taken. The rulings thus excepted to grew out of the erroneous theory on which the court appears to have proceeded in the trial of this action, which we think has been sufficiently discussed without treating in detail the other assignments. All those rulings are a succession of minor errors, emanating from the erroneous theory adopted by the court, as heretofore shown.

The order denying plaintiff's motion for new trial must therefore be reversed, and the cause remanded for trial *de novo*, proceeding therein according to the views herein expressed.

Order reversed.

All concur.

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COOK, RESPONDENT, v. GREENOUGH ET AL., APPELLANTS.

[Submitted October 17, 1893. Decided April 16, 1894.]

INJUNCTION BOND—*Damages—Attorney's fee.*—In an action upon an injunction bond the fact that plaintiff became liable for attorney's fees in the injunction suit is sufficiently shown by proof that he employed an attorney who procured a dissolution of the injunction, and of the reasonable value of his services.

SAME—*Same—Expenses.*—A verdict for expenses in procuring a dissolution of an injunction, in excess of what were actually proved, is improper, and should be remitted to the amount warranted by the evidence or a new trial granted.

Appeal from Fourth Judicial District, Missoula County.

ACTION upon an injunction bond. The cause was tried before MARSHALL, J., who denied defendant's motion for a new trial. Reversed conditionally.

Webster & Wood, for Appellants.

The complaint should state that the plaintiff has paid his attorney's fee. (*Willson* v. *McEvoy*, 25 Cal. 170; *Jackson* v. *Port*, 17 Johns. 479; *Churchill* v. *Hunt*, 3 Denio, 321; *Prader* v. *Grimm*, 28 Cal. 11; *Wilde* v. *Joel*, 6 Duer, 671; *Bustamente* v. *Stewart*, 55 Cal. 115; *Mitchell* v. *Hawley*, 79 Cal. 301; *Hovey* v. *Rubber Tip Pencil Co.*, 50 N. Y. 335; *Disbrow* v. *Garcia*, 52 N. Y. 654; 1 Sedgwick on Damages, § 237; *Hedges* v. *Meyers*, 5 Ill. App. 347.)

Henry C. Stiff, for Respondent.

There are some decisions holding that the attorney's fee must be paid by the plaintiff before he can recover therefor on the injunction bond, but there are numerous decisions to the effect that the incurrence of a liability to pay the fee is all that is necessary to entitle him to recover. (*Miles* v. *Edwards*, 6 Mont. 180; *Underhill* v. *Spencer*, 25 Kan. 71; *Loofborow* v. *Shaffer*, 29 Kan. 415; *Brown* v. *Jones*, 5 Nev. 374; *Noble* v. *Arnold*, 23 Ohio St. 264; *Shultz* v. *Morrison*, 3 Met. (Ky.) 98; *Steele* v. *Thatcher*, 56 Ill. 257.)

Per CURIAM.—This action is brought against the sureties on an injunction bond to recover damages suffered by defend-

ant in the injunction suit wherein such bond was executed and delivered, by reason of the employment of counsel and other expense incurred in procuring a dissolution of the injunction. Plaintiff recovered by the verdict of the jury one hundred dollars for counsel fees, and seventy-five dollars for other expenses incurred in the injunction action. This appeal is by defendants from an order denying new trial. The specifications are that the evidence does not sustain the verdict in two respects:

1. Appellants contend that there is no evidence that plaintiff herein became liable to pay an attorney fee for services in the injunction action; but, on the contrary, the evidence does show that plaintiff's attorney in that action was employed by him, and that he performed the services which resulted in a dissolution of said injunction, and that the services were reasonably worth one hundred and fifty dollars. Defendants admit such services were worth one hundred dollars, and this amount was found by the jury therefor. These facts clearly show that plaintiff became liable for such attorney's services.

2. The verdict also gave seventy-five dollars for other expenses. The evidence in this respect, by the most liberal interpretation, shows damages not exceeding thirty-two dollars and fifty cents. The court should have required plaintiff to remit the amount of damages not warranted by the evidence, or granted a new trial.

The case is remanded, with directions to grant a new trial, unless such excessive damages are remitted.

Remanded.

All concur.

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WATKINS ET AL., APPELLANTS, v. MORRIS ET AL., RESPONDENTS.

[Submitted January 31, 1894. Decided April 23, 1894.]

APPEAL—*Cost bond.*—But one cost bond is required in appealing from a judgment and an order, where such appeal is consolidated into one record.

Appeal from First Judicial District, Lewis and Clarke County.

ON MOTION to dismiss appeal. Granted as to appeal from the judgment.

Walsh & Newman, for the motion.

Henry C. Smith, and *F. N. & S. H. McIntire, contra.*

Per CURIAM.—In this case the respondents move to dismiss the appeal on two grounds: 1. Because it appears that there is an appeal from the judgment, and also an appeal from an order denying a motion for new trial, and there is but one cost bond given; 2. Because the notice of appeal from the judgment was not served or filed within one year after the entry of judgment.

The first ground of the motion to dismiss is not well taken. It has been the universal practice in this state, and in the late territory, in appealing from a judgment and an order, where such appeal is consolidated in one record, to give but one cost bond. The matter has never been before this court for adjudication, but it is held in California that the giving of one bond in such an appeal is sufficient. The supreme court of California said, in the case of *Chester* v. *Bakersfield etc. Assn.* 64 Cal. 42: "The practice of filing but one undertaking where appeals are taken, as in this case, both from the judgment and order denying new trial, is about as well settled as any question of that kind can be, and we do not think that it should now be treated as an open one." (See, also, Hayne on New Trial and Appeal, § 211, p. 645.)

It appears that the appeal from the judgment was not taken within one year after the judgment was entered. That appeal must therefore be dismissed, and it is so ordered. Appellants

themselves concede that this must be done, and say that they do not insist upon that appeal. This leaves the case pending in this court upon the appeal from the order denying new trial.

All concur.

CROWE, APPELLANT, v. LA MOTT ET AL., RESPONDENTS.

[Submitted November 2, 1893. Decided April 23, 1894.]

EQUITY—*Complaint to redeem—Chattel mortgage.*—In an action to redeem from a chattel mortgage a complaint which alleges that after the maturity of the debt the assignee of the mortgagee took possession of the property and has ever since held possession, treating the same as his own and selling portions thereof, but which does not allege any facts showing that in taking possession defendant in any manner violated the terms of the mortgage or otherwise wrongfully converted the property, fails to show grounds for equitable relief.

Appeal from Seventh Judicial District, Yellowstone County.

ACTION in equity to redeem from a chattel mortgage. Defendant's demurrer to the complaint was sustained by MILBURN, J. Affirmed.

E. P. Cadwell, for Appellant.

I. A mortgagor may maintain his suit in equity to redeem from a chattel mortgage after conditions broken, and after possession is taken of the mortgaged property by the mortgagee or his assignee. (Jones on Chattel Mortgages, § 801; 8 Am. & Eng. Ency. of Law, 200; *Heyland* v. *Badger*, 35 Cal. 404; *Brown* v. *Bement*, 8 Johns. 96; 3 Am. & Eng. Ency. of Law, 200; *Charter* v. *Stevens*, 3 Denio, 35; 45 Am. Dec. 444; *Sandford* v. *Flint*, 24 Mich. 26; *Van Brunt* v. *Wakelee*, 11 Mich. 177; *Porter* v. *Parmley*, 52 N. Y. 185; 2 Story on Equity Jurisprudence, § 1031; Story on Bailments, § 287; *Spaulding* v. *Barnes*, 4 Gray, 330; *Dupuy* v. *Gibson*, 36 Ill. 197; *Flanders* v. *Chamberlain*, 24 Mich. 305.)

II. The complaint is sufficient. (Jones on Real Estate Mortgages, 1090–99.) As to whether it is necessary to show and plead a tender kept alive in court, see *Daubenspeck* v. *Platt*, 22 Cal. 334; *Goldsmith* v. *Osborne*, 1 Edw. Ch. 560; *Waller* v. *Harris*, 7 Paige, 168; Jones on Chattel Mortgages, § 690;

Lavigne v. *Naramore*, 52 Vt. 267; *Tallon* v. *Ellison*, 3 Neb. 63–74; Jones on Real Estate Mortgages, § 1095; *Adams* v. *Nebraska etc. Bank*, 4 Neb. 370. When it is necessary to allege and show tender, see *Allerton* v. *Belden*, 49 N. Y. 373; *Lamb* v. *Jeffriey*, 41 Mich. 719. As to whether we are entitled to ask for an accounting in an action to redeem, see *Quin* v. *Brittain*, 1 Hoff. Ch. 353; *Barton* v. *May*, 3 Sand. Ch. 450.

O. F. Goddard, for Respondents.

Upon the breach of the condition the legal title to the chattels mortgaged becomes absolute in the mortgagee, and the mortgagor from thenceforth has no rights except such as are recognized by courts of equity. The mortgagee may thereupon take possession of the property, and so far as the legal rights of the parties are concerned he may treat it as his own, and may squander, destroy, or give it away. (Thomas on Mortgages, 145; Jones on Chattel Mortgages, 699–702; *Brown* v. *Bement*, 8 Johns. 95; *Ackley* v. *Finch*, 7 Cow. 290; *Langdon* v. *Buel*, 9 Wend. 80; *Patchin* v. *Pierce*, 12 Wend. 61; *Judson* v. *Easton*, 58 N. Y. 664; *Heyland* v. *Badger*, 35 Cal. 409.) After default the mortgaged property may be sold by the mortgagee as his own, and although the mortgage contain a power of sale, it will not be necessary for him to act under it in order to vest the title in the purchaser. If the mortgagee, after taking the property into his possession, has sold or destroyed it, and thereby put it beyond the power of the court to allow a redemption so as to reinvest the title in the mortgagor, the mortgagor may still seek compensation in equity, but relief in equity can be granted only upon payment or tender of payment of the whole mortgage debt, which must be averred and proved. To enforce his equity the appellant must do or appear to do equity, and that in an effective way. (Jones on Chattel Mortgages, §§ 684, 690; Thomas on Mortgages, 449; *Hall* v. *Ditson*, 55 How. Pr. 19; *Halstead* v. *Swartz*, 46 How. Pr. 289; *Heyland* v. *Badger*, 35 Cal. 412.)

Per CURIAM.—By this action plaintiff invokes the interposition of the equity power of the court to compel defendant to allow plaintiff to redeem certain goods and chattels from the

encumbrance of a mortgage thereon, and on such redemption to require defendant to deliver to plaintiff all of said chattels now in possession of defendant, and, further, to require defendant to account for all proceeds derived from sales of portions of said chattels since defendant took possession thereof, pretending to act pursuant to said mortgage.

The complaint sets forth: That to secure payment of three thousand dollars, evidenced by a promissory note executed and delivered by plaintiff to defendant Sebastian Wustum, plaintiff duly executed, acknowledged, and delivered to him a chattel mortgage of plaintiff's one-half interest in and to a certain band of horses, and other personal property, which said promissory note and mortgage were thereafter duly assigned and delivered to defendant La Mott. That, after maturity of the debt secured by said mortgage, defendant La Mott took possession of said chattels, and has ever since held possession thereof, treating the same as his own, and selling portions thereof, the proceeds of which sales amount to three thousand dollars. That said property was of the value of eighteen thousand dollars. (This averment not being clear, however, as to whether plaintiff's half interest, or the whole property, was of that value.)

In addition to said chattel mortgage executed and delivered to secure said debt, certain real estate was also mortgaged as further security for the same debt, which real estate was, on default of payment, after maturity, of said debt, sold, pursuant to the order of court, in a foreclosure action, in the sum of five hundred dollars, to be applied on said mortgage debt. That, since defendant La Mott took possession of said chattels, he executed and delivered to defendant Wustum a chattel mortgage thereon, purporting to secure a debt of three thousand dollars owing by La Mott to said Wustum. Wherefore, defendant Wustum is made party to this action, as still having an interest in said chattels. Plaintiff further alleges that he is able, willing, and desirous to pay all that may be found due on his said mortgage, and interest, after an accounting and credit thereon of the proceeds derived from sales of said chattels by La Mott since he took possession thereof, as well as the proceeds derived from the sale of said real estate under said foreclosure proceedings. And plaintiff asks that an

account be required by order of court as to said proceeds, and to give credit accordingly, and ascertain the amount due on said debt, and that redemption of said property be allowed and enforced on behalf of plaintiff as aforesaid.

The complaint was demurred to on the averment that it fails to state facts sufficient to constitute a cause of action. This demurrer was, on consideration by the court, sustained; and, plaintiff having declined to amend his complaint, judgment was entered in favor of defendants, from which plaintiff prosecutes this appeal, insisting that his complaint shows sufficient grounds for equitable relief in the behalf demanded by plaintiff.

The demurrer was well taken, because, as appears from an examination of the complaint, plaintiff entirely failed to allege any fact showing that, in taking possession of said chattels, defendant, in any manner, proceeded contrary to, or in neglect or violation of, the terms of said mortgage. According to plaintiff's complaint, defendant La Mott took possession of said chattels after maturity of the mortgage debt secured thereby. So far plaintiff proceeds according to the terms of the mortgage, which is, *in hæc verba*, made part of plaintiff's complaint. Thereafter, if La Mott proceeded to extinguish the title and right of redemption in plaintiff, by advertisement and sale, according to the terms of said mortgage, or caused the same to be done by action of the sheriff of said county, according to law, and the terms of said mortgage, or accomplished the same by foreclosure thereof through action in court, defendant may lawfully have become the purchaser of said chattels, and still continue in possession, treating the same as his own, as alleged in the complaint. But that La Mott did neglect to do those things the complaint does not show. The complaint is entirely silent upon these important and material points. It is not permissible to assume, without averment, that a man proceeded wrongfully to convert property. The facts showing such wrongful conversion must be alleged. Defendant La Mott may have done all the complaint alleges in regard to said property, and yet violated no right or equity of plaintiff, provided he likewise fulfilled the terms of said mortgage as to advertisement and sale of the property, and

payment to plaintiff of any residue of the proceeds after satisfying the mortgage debt. If he fulfilled those conditions, and became purchaser of said property, his title may have thereby become absolute. But, if he neglected those conditions of the mortgage, there would be ground for an action on behalf of plaintiff; and a court of equity would grant relief if there appeared to be no adequate remedy at law, as for wrongful conversion—a question not raised on this appeal, and therefore not necessary to be here considered. But the complaint is entirely wanting in allegations showing that defendant neglected to proceed in his action regarding said chattels according to the terms and conditions of said mortgage, and therein the complaint appears to be insufficient. Judgment affirmed.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

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McGUIRE, APPELLANT, v. EDSALL ET AL., RESPONDENTS.

[Submitted March 21, 1893. Decided April 23, 1894.]

PLEADING—*Counterclaim.*—Under sections 89 and 90 of the Code of Civil Procedure, permitting a defendant, by answer, to plead an existing counterclaim as new matter constituting a defense, it is error for the court to permit defendant by amendment to plead a counterclaim maturing after the action is commenced.

Appeal from Ninth Judicial District, Gallatin County.

JUDGMENT was rendered by ARMSTRONG, J., for plaintiff, less a counterclaim. Reversed as to allowance of defendant's counterclaim.

E. P. Cadwell, for Appellant.

Luce & Luce, for Respondents.

Per CURIAM.—The sole question involved in this case is whether the trial court erred in permitting defendants, by amendment of their answer, to plead a counterclaim against the demand of plaintiff, which counterclaim matured after

plaintiff's action was commenced. The court allowed such amendment during the trial, and permitted evidence to be submitted in support of the counterclaim thus introduced into the action. This practice cannot be sustained. Our statute provides upon this subject that the defendant, by answer, may plead a counterclaim as new matter constituting a defense (Code Civ. Proc., § 89), and that the counterclaim mentioned "shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action arising out of the following causes of action." (Code Civ. Proc., § 90.)

With scarcely any conflict of opinion, it is held that the counterclaim thus pleaded must be one existing and matured for action in favor of the party asserting the same at the time the action was commenced wherein such counterclaim is sought to be pleaded. This is held in several California cases, where the subject appears to have been carefully considered, under like provisions of statute, from which state, no doubt, our statute on this subject was borrowed. Not only so; such holding is supported by the great weight of reason, as will be found expounded in the following cases. (*Paige* v. *Carter*, 64 Cal. 489; *Gannon* v. *Dougherty*, 41 Cal. 661; *Jeffreys* v. *Hancock*, 57 Cal. 646; *Trafford* v. *Hall*, 7 R. I. 104; 82 Am. Dec. 589; *Lee* v. *Lee*, 31 Ga. 26; 76 Am. Dec. 681; *Smith* v. *Washington Gaslight Co.*, 31 Md. 12; 100 Am. Dec. 49; *Hayes* v. *Hayes*, 2 Del. Ch. 191; 73 Am. Dec. 709; *Smith* v. *Ewer*, 22 Pa. St. 116; 60 Am. Dec. 73; *Shepherd* v. *Turner*, 3 McCord, 249; 15 Am. Dec. 631; *Gregg* v. *James*, Breese, 143; 12 Am. Dec. 152; *Hill* v. *Kroft*, 29 Pa. St. 188; *Speers* v. *Sterrett*, 29 Pa. St. 194; *Lyon* v. *Petty*, 65 Cal. 322; Bliss on Code Pleading, § 369, et seq.)

It appears that upon the trial defendants succeeded in establishing their counterclaim to the satisfaction of the jury, and the same was offset against the demand of plaintiff, and plaintiff was given judgment for the amount of his demand over and above such offset. We are satisfied that this was error, and that therefore the judgment must be reversed and a new trial ordered. This court cannot direct judgment, for the reason that there was a conflict in the testimony, and there is nothing

before us by which we may determine whether the jury, by their verdict, allowed all of the counterclaim, or only a part thereof. Or whether they reduced plaintiff's claim, instead of allowing the whole of the counterclaim. (*Lebcher* v. *Commissioners*, 9 Mont. 315.) Judgment reversed and cause remanded for new trial.

Reversed.

All concur.

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KLINE, RESPONDENT, v. HANKE ET AL., APPELLANTS.

[Submitted November 3, 1893. Decided April 23, 1894.

TRIAL—*Directing verdict—Action for rent.*—On the trial of an action to recover rent it is error for the court to direct the jury to find for the plaintiff when there is evidence tending to support a defense that defendant did not enter the premises in question under a lease for years, but merely as a tenant from month to month.

ACTION ON LEASE—*Defenses, consistency of.*—In an action upon a lease a defense that defendant was merely a tenant from month to month is not inconsistent with a defense that by reason of acts and omissions of the plaintiff, amounting to an eviction, defendants were compelled to remove from the premises.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on a lease. The cause was tried before BUCK, J., who directed a verdict for plaintiff. Reversed.

Henry C. Smith, for Appellants.

An agreement for a lease will not be enforced if its conditions are unperformed or broken by the landlord. (1 Taylor's Landlord and Tenant, § 388; *Tomilinson* v. *Day*, 2 Brod. & B. 681.) A tenant whose rent is payable monthly under a general holding or a void parol lease will hold from month to month. (*Hurd* v. *Whitsett*, 4 Col. 77; *Western Union Tel. Co.* v. *Fain*, 52 Ga. 18; *Brownell* v. *Welch*, 91 Ill. 523.) The failure to complete the building amounted to an eviction. (*Royce* v. *Guggenhein*, 106 Mass. 201; 8 Am. Rep. 322; *Skally* v. *Shute*, 132 Mass. 367.) The evidence as to the presence of the lewd woman and the nuisances complained of should have gone to the jury. (*Dyett* v. *Pendleton*, 8 Cow. 727; *Cohen* v. *Dupont*, 1 Sand. 260; *Alger* v. *Kennedy*, 49 Vt. 109; 24 Am. Rep. 117; *Halligan* v. *Wade*, 21 Ill. 470; 74 Am. Dec. 108;

Bissell v. *Lloyd*, 100 Ill. 214; 1 Taylor's Landlord and Tenant, § 381; *Rowbotham* v. *Pearce*, 5 Houst. 135; *Levitzky* v. *Canning*, 33 Cal. 299.) At least it was a question for the jury as to whether by his acts plaintiff did not intend an eviction. (1 Taylor's Landlord and Tenant, § 381.)

C. H. Fleischer, also for Appellants.

H. S. Hepner, for Respondent.

Even though an agreement to give a more formal lease be embodied in the writing, still, if there are words of present demise, it has been held to be only in the nature of a covenant for further assurance. (Taylor's Landlord and Tenant, § 41, and cases cited; Tiedeman on Real Property, § 179; Washburn on Real Property, 397, 398; 1 Woodfall on Landlord and Tenant, *95, 96; *Hallett* v. *Wylie*, 3 Johns. 44, 47, 48; 3 Am. Dec. 457; *Jackson* v. *Kisselbrack*, 10 Johns. 336; 6 Am. Dec. 341; *Whitney* v. *Allaire*, 1 N. Y. 305; *Bacon* v. *Bowdoin*, 22 Pick. 401. See, also, *Chapman* v. *Bluck*, 4 Bing. N. C. 187.) The theory on which appellants based their case rested upon a new and different agreement than the one set out by plaintiff. This new agreement was alleged tenancy from month to month. Appellants' contention of an eviction under such theory should have no standing, inasmuch as they were at liberty to vacate the premises at the expiration of each month. As there was no evidence to indicate a notice of intention to move, testimony of an eviction would have been proper, provided the new agreement (under which such eviction is alleged to have taken place) had been proven. This they failed to do.

Per CURIAM.—The object of this action is to recover rent alleged to be due from defendants to plaintiff under the terms of a lease of certain premises in the city of Helena, which demand is for rent accrued after defendants vacated said premises. The instrument on which plaintiff relies as a lease, set forth in his complaint, discloses a contract between plaintiff and defendants, whereby plaintiff agreed to erect a certain described building on one-half of lot 31, block 2, of said city, to be completed and ready for occupation by defendants on or

before August 15, 1890, and to lease the same to defendants for the period of five years from that date at a rent of fifty-two dollars and fifty cents per month, payable in advance; and defendants, on their part, agreed, by the terms of said instrument, to lease said premises for said period at the rent aforesaid, when so erected by plaintiff according to the terms of said contract.

Defendants, by answer, admit the execution of said contract, but allege that the same never became effectual, because said building was never completed as provided thereby. That defendants went into said building under another and entirely different contract, entered into with plaintiff about the time said building was completed; that is, a parol contract, whereby defendants agreed with plaintiff to lease said building from month to month, at a rent of fifty-two dollars and fifty cents per month, and not otherwise. And defendants, for further defense, allege that said building, by reason of the acts and omissions of plaintiff, became untenantable, whereby defendants' eviction therefrom was caused by plaintiff, in that no substantial roof was put upon said building, so as to prevent leakage, and by reason thereof great quantities of water came into said building upon defendants' goods, furniture, and fixtures, whereby the same were damaged, and defendants' business greatly interrupted. That plaintiff was frequently notified of such defective condition of said roof, the leakage, and the injury to defendants' goods and business therefrom; but that plaintiff neglected to repair the roof of said building to prevent such leakage. That the lower part of said building occupied by said defendants was by them used for the purpose of conducting a butcher's business therein, and the upper part of said building so leased by defendants was used for residence purposes by one of the defendants and his family. That plaintiff had control of other parts of the second story of said building, and occupied apartments therein. That said upper story was so arranged that it was necessary for both plaintiff and those residing therein by his permission, and defendants and his family, to use a hallway, hydrant, and sink in common, in their occupation thereof. That plaintiff's conduct in his use and occupation of that portion of the building, and the

purposes for which he allowed the same to be used, were such as amounted to a continuing nuisance, whereby defendants' use and enjoyment of the portion thereof by them leased was prevented, in this: that plaintiff emptied into said sink, situated under said hydrant, wherefrom defendant and his family, residing in the upper part of said building, obtained water for family use, certain filthy matter, brought thereto from plaintiff's lodging apartments, whereby and wherefrom noxious odors, offensive to the senses and deleterious to health, arose and permeated the upper part of said building, and that such nuisance was continued a long time; and that plaintiff also allowed lewd women to occupy apartments in the upper story of said building, with whom defendant's wife was compelled to meet in her use of said common hallway therein, whereby defendant was prevented from continuing his occupation of said building with comfort and enjoyment, or with safety to the health of himself and family, and was thereby compelled to remove therefrom as evicted by the acts of plaintiff.

By replication plaintiff put in issue all the affirmative allegations of the answer, and on the issues thus raised by the pleadings the trial ensued, whereat both parties introduced testimony in support of their contention; but at the close of the introduction of testimony the court, having excluded certain testimony offered on the part of defendants, directed the jury, on motion of plaintiff, to return a verdict in his favor, which the jury did accordingly.

The assignments of error which we deem necessary to examine relate to the action of the trial court in striking out certain testimony introduced by defendants, and also excluding other evidence by them offered, and peremptorily directing the jury to return their verdict for plaintiff; which assignments will now be considered.

Upon the trial, plaintiff introduced evidence tending to support the allegations of the complaint, and, plaintiff having rested, defendants introduced evidence on their part, tending to support their defense that said original contract providing for the erection of said building by plaintiff, and the lease thereof by defendants for the period of five years, was abandoned by reason of the failure of plaintiff to erect and com-

plete the same within the time provided; and that defendants did not enter said premises pursuant to the terms of said contract, but went in under a parol agreement to lease and occupy said premises from month to month, as averred in the answer. This evidence was admitted, and tends to support that branch of the defense, whereby it clearly appears that the peremptory direction of the court to the jury to find for plaintiff, without consideration of the evidence offered in support of that defense, was erroneous. Not only so, the testimony of Schopfer, stricken out, and that of other witnesses offered by defendants and excluded by the court, tended to support the allegations of defendants' answer as to the imperfect roof on said building, the leakage, and the creation and maintenance of a nuisance therein by plaintiff. The objection to said evidence, sustained by the court, states that the same is immaterial, irrelevant, and incompetent. It appears to be tainted with none of those characteristics, for the testimony excluded purported to be that of witnesses having personal knowledge of the conditions mentioned.

But the more remote cause of irrelevancy suggested is that defendants' two defenses set up are inconsistent. Even this would not justify the ruling of the court which denied defendants the benefit of both defenses by directing the jury to return a verdict for plaintiff, without consideration of any part of the defense. The suggestion that the defense affirming that defendants were, in effect, evicted from said premises by the alleged misconduct of plaintiff is inconsistent with the other alleged defenses to the effect that defendants had only leased from month to month, and therefore defendants should not be allowed to prove both defenses, cannot be maintained. Defendants may allege as many defenses as they have. Two are alleged in this case. It may well have been considered by defendants that the court and jury might not adopt their contention that they went into said premises under an agreement to rent from month to month, independently of the original contract. If the court and jury interpreted the facts and circumstances against defendants on that defense, and held that defendants were committed to a lease for five years, can it be maintained that they could not show facts of which plaintiff was the author, amounting to an eviction of defendants during

said term of five years? We think not. There is no inconsistency, contradiction, or incompatibility in these two defenses which forbids pressing both forward with such evidence as defendants can command.

Judgment and order reversed, and cause remanded for new trial.

Reversed.

All concur.

MILLIGAN, RESPONDENT, v. CUFF, APPELLANT.

[Submitted October 25, 1893. Decided April 23, 1894.]

FORCIBLE ENTRY AND UNLAWFUL DETAINER—*Plaintiff must have peaceable possession.*—The lessor of a lot upon which the lessee had erected a building under a lease providing that all improvements put upon the premises should become forfeited upon default in payment of rent for sixty days, cannot, after refusing a tender of two months' rent, upon the express ground that rent for three months was due, maintain an action for forcible entry against the defendant to whom the lease had been transferred, where it appeared that immediately after refusing the two months' rent he had placed two men within the building during the temporary absence of the defendant who had occupied the house during the preceding night and that day until one o'clock, when he went out for dinner, and who upon returning had forced his way into the house and turned out the men, since the plaintiff had acquired no peaceable possession at the time of defendant's entry; and had the two months' rent been accepted there would have been no sixty days' default under which a forfeiture of the building could have been declared.

SAME—*Possession by plaintiff.*—The mere fact that lessor of premises had given permission to the lessee's mortgagee to remove some furniture from an upper story and store it in a lower room, after such permission had been refused by the lessee's agent, does not establish such a possession as to enable the lessor to maintain an action for forcible entry.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for forcible entry and unlawful detainer. The cause was tried before DURFEE, J. Plaintiff had judgment below. Reversed.

Brazelton & Scharnikow, for Appellant.

The evidence conclusively shows that the defendant, or his agents, were in constant possession of the property, although frequently absent for a short time. That during such absence George Plaisted went upon the premises. That upon his return the defendant again took possession, without force.

Defendant entered in good faith and under claim of title as lessee, and therefore could not be guilty of unlawful detainer. (*Conroy* v. *Duane*, 45 Cal. 597; *Powell* v. *Lane*, 45 Cal. 677; *Shelby* v. *Houston*, 38 Cal. 422.) No other evidence of possession on the part of plaintiff was produced than that George Plaisted went upon the property in controversy for a short time, during the temporary absence of the defendant or his agents. This was a wrongful entry on his part, and is not such a possession as will maintain an action of this character. (*Mason* v. *Hawes*, 52 Conn. 12; 52 Am. Rep. 552; *Harrington* v. *Scott*, 1 Mich. 17; *Mitchell* v. *Carder*, 21 W. Va. 277.) No evidence of any character is produced by the plaintiff that any demand whatever was made for rent, or a notice of forfeiture served on defendant. This is necessary before a recovery can be had. (2 Woodfall on Landlord and Tenant, § 449; 8 Am. & Eng. Ency. of Law, 140; *Johnston* v. *Hargrove*, 81 Va. 118; *Cone* v. *Woodward*, 65 Ill. 477.) No attempt whatever is made to show that a demand for possession was made as required by statute, to recover possession from a tenant for covenant broken. A failure to make this demand is an absolute bar to this action. (Code Civ. Proc., § 727, Comp. Stats.; *Martin* v. *Splivalo*, 56 Cal. 128; *King* v. *Connolly*, 51 Cal. 183; *McDevitt* v. *Lambert*, 80 Ala. 536; *McLean* v. *Spratt*, 19 Fla. 97.) The court, in giving instructions for plaintiff, erred in holding that the only issue was the fact whether or not on March 12, 1890, the plaintiff or agent was in the possession, and the defendant took possession forcibly. The plaintiff having admitted the execution of the lease, and failed to prove its forfeiture, the possession of plaintiff would, of itself, be wrongful, and not the issue to be presented to the jury, as they so were in said instructions, unless the demand for rent and possession or declaration of forfeiture was also made, and found by the jury. (*Nason* v. *Best*, 17 Kan. 408; *Hyde* v. *Goldsby*, 25 Mo. App. 29; *Lichty* v. *Clark*, 10 Neb. 472; *Dutton* v. *Colby*, 35 Me. 505; *Williamson* v. *Paxton*, 18 Gratt. 475.)

Durfee & Brown, for Respondent.

The act of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully

detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff in the original complaint and the unlawful or forcible ouster or detention by the defendant—the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of the plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform. (*Parks* v. *Barkley*, 1 Mont. 514; *Boardman* v. *Thompson*, 3 Mont. 387; *Sheehy* v. *Flaherty*, 8 Mont. 365; *Voll* v. *Hollis*, 60 Cal. 570; *Holland* v. *Green*, 62 Cal. 67; *Gidding* v. *'76 Land and Water Co.*, 83 Cal. 100.) The testimony shows that the plaintiff by her agent, George Plaisted, was in actual and peaceable possession of the property in controversy from February 26th or 28th, 1890, to March 12th, 1890, and had let a portion of the house to other persons for storage purposes. The testimony further shows that the property had been vacant and abandoned several months prior to the taking possession of it by the plaintiff; that the manner of obtaining possession of the property was peaceable; that the plaintiff was ousted from possession, and the property detained by force and violence. The law requires no one to do a vain thing; the property in controversy was abandoned and the whereabouts of the defendant or his grantor unknown; the plaintiff, through her agent, used every diligence to collect the rent due, without success; the defendant and his grantor had forfeited all right of possession they ever had, by nonpayment of rent and abandonment. As to whether the plaintiff demanded rent, or declared a forfeiture, is immaterial, if her possession was actual and peaceable and her ouster violent and forcible. The law is fixed on this point, and the cases already cited on this subject are conclusive. Had the possession of the plaintiff been scrambling, or other than open, peaceable, and notorious, the jury under the instructions given for both the plaintiff and defendant had ample warrant to so find and give the defendant their verdict.

Per CURIAM.—By this action, plaintiff seeks judgment for restitution of possession of a certain lot and building thereon situate in Phillipsburgh, Deer Lodge county, whereof plaintiff, by her complaint, avers that she was on the 12th of March, 1890, the owner and in peaceable possession; that defendant, then and there, contrary to the statute in such cases made and provided, entered into said premises, and with strong hand took possession thereof, and ever since has wrongfully withheld possession, to plaintiff's damage in the sum of one hundred dollars. Wherefore, plaintiff demands judgment for restitution of said premises, and damages, in the sum of one hundred dollars, for wrongfully entering and withholding possession thereof. Defendant, on his part, pleads not guilty of the alleged forcible entry or unlawful detainer, and denies that plaintiff is entitled to any damage by reason of defendant's occupation of said premises.

Plaintiff prevailed on the trial, recovering judgment for restitution of possession of said premises, and for damages greatly exceeding the amount alleged or demanded in the complaint, to wit, seven hundred and thirty-three dollars.

Defendant's motion for new trial specifies error in certain instructions to the jury, and that the evidence is insufficient to support the verdict; and, his motion for new trial having been overruled, he appeals from that order, insisting that his specifications are well founded, as shown by the record.

After the action was instituted plaintiff died, and the present plaintiff was substituted as her administrator.

The evidence shows that one Morris leased said lot about August 7, 1889, for the period of three years, conditioned, as shown by the lease introduced in evidence, that the lessee (Morris) should have the possession and use of said premises for three years from that date, for which he agreed to pay the sum of twenty-five dollars per month rent, payable monthly in advance, and that default of such payment for sixty days should subject the leasehold, and all improvements put upon said premises by the lessee, to forfeiture; that, pursuant to such lease, Morris took possession, and erected on said lot a two-story frame building 24 x 85 feet in dimensions, at a cost of about two thousand five hundred dollars, arranging the lower

story for the purpose of conducting a saloon business therein, and furnishing the same with certain fixtures for the purpose of carrying on such business; that the upper story of said building was arranged in rooms, carpeted and furnished, for lodging purposes. That Morris did not engage in a saloon business in said building, as was intended by him when he erected the same, for the reason, as he asserts in his testimony, that the opportunity for such business was then unpromising. But it appears the upper rooms were used for lodging purposes by Morris, as far as he could find tenants therefor, during a short period after the building was completed and furnished; his wife the while having charge and taking care of the lodging department of said house; that Morris, finding it necessary, on account of the quiet state of business at Phillipsburgh, to go elsewhere to seek employment, about October 2, 1889, removed to Anaconda, where he found employment, and brought his wife and family there shortly afterwards, leaving said premises, with the furniture and fixtures therein, in charge of defendant, Cuff, to whom, according to the testimony of defendant and Morris, the leasehold and improvements on said lot had been sold and conveyed by Morris. Afterwards, Morris sent from Anaconda to plaintiff fifty-one dollars in payment of the rent, which, as all parties agree, paid the rent up to December 15th of that year. Defendant Cuff, appears to have assumed control over said premises after the departure of Morris, but was absent therefrom most of the time during said winter. He claims to have left the premises in charge of Charles McDermott, to take care of the building, and rent the rooms in the upper story, in his absence. McDermott testifies that he did the same in the absence of Cuff, and collected some rents from lodgers in said rooms, and this is not disputed. During all this time plaintiff, lessor of said premises, and her husband, George Plaisted, who acted as her agent in respect to said lease and premises, resided a short distance therefrom; and George Plaisted testifies, on behalf of plaintiff, that during said winter the building on said lot was not occupied, with the exception of the occasional occupation of some of the rooms by lodgers; that during said winter he frequently passed by said

building, and on one occasion closed and put a prop against the door thereof.

The event which plaintiff claims amounted to a forcible entry and unlawful taking of possession of said premises by defendant occurred about March 12, 1890 (the particular date being immaterial, except that these events happened prior to March 15th, which all agree). At that time there were three months' rent due. That according to the testimony of all the parties, about that date Morris and Cuff visited George Plaisted, plaintiff's agent, at the residence of the latter, and offered to pay two months' rent, but Plaisted declined to take such payment. In speaking of this interview, in his testimony on behalf of plaintiff, Plaisted says: "I wanted full rent. I wouldn't take two months' rent, as they offered." And, according to his testimony, that is the only reason he asserted for declining the payment of two months' rent offered by defendant. Immediately after this interview, as shown by the testimony, Plaisted called to his aid Simmons and Sherman, whom he brought to said house, and directed them to stay there, and hold possession thereof while he (Plaisted) would go down town, as he said, and procure a lock, and return. As Plaisted started on such errand, when but a short distance from said house, he met defendant apparently going to the house. Thereupon Plaisted turned and followed defendant. Defendant, on reaching said house, attempted to open the door and enter; but, finding the latch fastened, he climbed into the house through a large opening in the door, where the glass formerly therein had been broken out. While so doing, Simmons tried to prevent defendant from entering; but failing, defendant came in, and said to Simmons, "Now, you go out." Whereupon Simmons went out, as all the witnesses agree. On the part of plaintiff, however, the witnesses assert that, when defendant ordered Simmons out, he took hold of his shoulder, and pushed him. This defendant denies. It also appears that about the same time defendant ordered Sherman out, and he went out, also. While these events were transpiring plaintiff's agent, George Plaisted, was just outside of the building. Thereafter defendant continued in possession, and this action was immediately instituted in the justice's court of that township,

founded entirely upon the proposition that, when the episode just described occurred, plaintiff was in the peaceable possession of said premises, and that said acts of defendant, Cuff, amounted to a forcible entry and unlawful detainer thereof.

The decision of the case must turn upon the question as to which of these two contending parties had actual possession, in contemplation of law, at the time defendant entered, and ordered Simmons and Sherman out of said house. The evidence introduced on behalf of defendant, and not disputed, is to the effect that both Morris and defendant had occupied and slept in said building during the previous night, and were in possession thereof during that morning; that there were fixtures and furniture in said building belonging to either Morris or defendant, Cuff, the evidence not being clear which of them owned the fixtures and furniture remaining therein; that, as before stated, Cuff had that morning offered Plaisted payment of two months' rent due on said lease; that, when Plaisted declined to receive such payment, he did so on the express ground that he wanted all the rent paid, with no intimation that he had assumed possession of said premises, or intended to insist on a forfeiture of the leasehold and improvements because the rent was in arrears. His expressions to defendant, as related in his own testimony, fairly implied that the payment of the rent in full would be satisfactory to plaintiff. It is to be borne in mind, too, that had Plaisted received the two months' rent, as offered, on that occasion there would have remained only one month's rent in arrears at that time, and for such arrears the leasehold and improvements would not have been subject to forfeiture. Nor was plaintiff or her agent, Plaisted, actually in possession at the time he declined to receive the payment offered; but, according to the evidence disclosed by this record, defendant was in possession, actually occupying said premises. Defendant testifies that he not only slept in said house the night previous, but was there during that day until about one o'clock, when he went down town to a restaurant for his dinner, and was returning therefrom when he met Plaisted, and on going to the house found Simmons and Sherman therein, and ordered them out as aforesaid. His testimony stands uncontradicted. According to the testimony disclosed

by the record, without conflict, plaintiff had acquired no actual peaceable possession when the event took place on which he asserts that defendant made a forcible entry into said premises. At most plaintiff attempted to gain possession of said premises and failed. We do not think plaintiff even succeeded in getting what might be termed "scrambling possession." (*Bowers* v. *Cherokee Bob*, 45 Cal. 502, and cases cited; *Voll* v. *Butler*, 49 Cal. 74.) The inference to be gathered from the facts shown by the record is that plaintiff proposed and sought to assume possession of said premises, and forfeit to her use and benefit the improvements thereon, of the value of over two thousand dollars, for three months' rent, at twenty-five dollars per month, then in arrears. Without notice or intimation to the lessee of such purpose plaintiff attempted to take possession of said premises, but failed to establish peaceable possession, for she was repulsed in the attempt. Instead of being the one against whom a forcible entry was made, plaintiff herself, through her agent, was attempting to make an unlawful entry and failed. As before observed, had plaintiff received the two months' rent offered there would have been only thirty days' rent then in arrears, and consequently the leasehold and improvements would not have been subject to forfeiture, under the terms of the lease. But, while these environing circumstances may have a bearing explanatory of the acts and intentions of the parties they relate more directly to the right of possession, which is not under consideration in this case. The decision turns upon the question as to who was in actual possession when the event occurred on which plaintiff founds this action.

Plaintiff appears to rely to some extent on the fact that prior to her attempt to take possession of said premises, as aforesaid, she had given permission to Evans & Co. to store some furniture in the lower room of said building. The facts on this point, as disclosed by the record, show that Evans & Co. held a chattel mortgage on certain furniture in the upper rooms of said building, and, on taking possession thereof to foreclose the mortgage, they applied to McDermott, who, according to the testimony on behalf of defendant, was in charge of said building for a time, as a representative of

defendant, Cuff, for permission to take said goods from the upper story, and store the same a short time in the lower room; that McDermott declined to give any such permission, whereupon Evans & Co. applied to Plaisted for like permission in respect to said goods, and, according to Plaisted's testimony, he granted the same, and said goods were transferred from the upper to the lower story of said building, and remained there, in the care of Evans & Co. a short time, until sold in foreclosure of said mortgage. It does not appear that plaintiff had any interest in said goods whatever. The same appear to have been the property of Morris, subject to the lien of Evans & Co. thereon; and the mere permission which plaintiff asserts he gave to Evans & Co. to move said goods from one part of said building to another does not, under the circumstances, have any weight in determining the main question in this case.

The impression gained on the argument of this case was that the facts supported plaintiff's recovery, but, on a thorough consideration of the facts presented by the record, we find the evidence entirely insufficient to sustain the finding that defendant made the forcible entry or unlawful detainer charged in the complaint. Moreover, the damages awarded greatly exceed the amount warranted under the allegations of the complaint.

The instruction by the court to the jury which excluded from its consideration the acts of McDermott, as representative of Cuff, as shown in evidence, on the ground that Cuff, as representative of Morris in said lease, could not delegate his authority to McDermott, was inconsistent with the charge to the jury to consider the acts of Simmons and Sherman in attempting to take and hold possession of said premises at the instance of plaintiff's agent, Plaisted, as acts authorized by plaintiff, and done in her behalf; the court thus assuming and charging the jury that Plaisted, as agent of plaintiff, could delegate his authority to act in aid and benefit of plaintiff in reference to said premises, but that a representative of Morris, in charge of said building, could do no such thing. This instruction, in effect, lays down one rule of law to govern

plaintiff's side of the case, and a contrary rule to govern the defendant, under similar conditions.

Judgment and order denying new trial reversed, and the cause remanded, with directions to grant defendant's motion for new trial.

Reversed.

All concur.

BROOKE, RESPONDENT, v. JORDAN, APPELLANT.

[Submitted August 9, 1893. Decided April 30, 1894.]

EVIDENCE—*Lost deed—Hearsay.*—The introduction in evidence of the record of the probate court reciting the execution and delivery by the probate judge of a deed of a lot, accompanied by testimony of the grantee's attorney that he placed the deed in his safe at the request of the grantee; that his office was afterwards burglarized and the deed and other papers abstracted from the safe, and that he had on several occasions made diligent but unavailing search in his office, and also at the grantee's house and other places to find said deed, constitutes a sufficient foundation for proof of the contents of such lost deed. And such sufficient foundation being laid, testimony by such attorney that the person who robbed the safe confessed to having burned all the papers, while objectionable as hearsay, would not be ground for reversal.

TOWNSITE—*Survey.*—Although certain lots were not laid off and platted by a certain survey as part of the original townsite of Helena this fact did not render such lots open to appropriation and entry as public land, where the *locus in quo* was within the townsite as entered and patented by the probate judge.

Appeal from First Judicial District, Lewis and Clarke County.

EJECTMENT to recover possession of town lots. The cause was tried before BUCK, J. Plaintiff had judgment below. Affirmed.

T. J. Walsh, for Appellant.

Some evidence was given from which it might be inferred that the deed may have been destroyed, but unless the evidence is conclusive of destruction, proof of search must be made. (*Jackson* v. *Hasbrouck*, 12 Johns. 192.) Under the authorities it is indispensable that the heirs or personal representatives, in case the grantee is dead, should be called to testify to having searched for the missing deed, or their failure to testify must be explained. (Wharton on Evidence, 144.) The lack of their testimony is not supplied by the testimony of Shober to the effect that they had searched. (*Taunton Bank* v. *Richard-*

son, 5 Pick. 443; *Parkins* v. *Corbett*, 1 Car. & P. 282.) The trial took place in April, 1892. The last search made by the witness for the deed was in 1888 or 1889. This was altogether too remote. (*Porter* v. *Wilson*, 13 Pa. St. 641.) Proof of due execution is an essential prerequisite to the introduction of secondary evidence of the contents of a lost deed. (*Porter* v. *Wilson*, 13 Pa. St. 641; *Perry* v. *Roberts*, 17 Mo. 36; *Loftin* v. *Loftin*, 96 N. C. 94.) There must be clear and satisfactory evidence of the genuineness of the signature. (*Slone* v. *Thomas*, 12 Pa. St. 209; *Potts* v. *Coleman*, 86 Ala. 94.) The contents of the deed must be clearly established. (*Lampe* v. *Kennedy*, 56 Wis. 249; *Elwell* v. *Walker*, 52 Iowa, 256; *Wakefield* v. *Day*, 41 Minn. 344; *Edwards* v. *Noyes*, 65 N. Y. 125.) Hearsay is not admissible upon this issue any more than upon any other. (Phillips on Evidence, 517.)

Shober & Rasch, for Respondent.

The sufficiency of the preliminary proof to lay a foundation for the introduction of a lost instrument rests in the sound discretion of the court. The object of the proof is merely to establish a reasonable presumption of the loss of the instrument. (1 Greenleaf on Evidence, par. 558; 13 Am. & Eng. Ency. of Law, 1088; *Conoly* v. *Gayle*, 61 Ala. 116; *Camden* v. *Belgrade*, 78 Me. 204; *Graham* v. *Campbell*, 56 Ga. 258; *McCulloh* v. *Hoffman*, 73 N. Y. 615.) All that is required is reasonable diligence to obtain the original. (*Minor* v. *Tillotson*, 7 Pet. 99; *Jernigan* v. *State*, 81 Ala. 58.) The testimony shows that diligent but unsuccessful search was made in all places where, if it were still in existence, it should have been found. The search was resumed after plaintiff's death with no better result. Its loss will be presumed. (*Fretwell* v. *Morrow*, 7 Ga. 264; *Vaughn* v. *Biggers*, 6 Ga. 188.) Testimony by the proper custodian of a deed that he has searched for it and cannot find it opens the door for the admission of secondary evidence. (*Woody* v. *Dean*, 24 S. C. 499; *Postel* v. *Palmer*, 71 Iowa, 157.) The secondary evidence having been admitted, it became the province of the jury to judge of its credit and weight. It took the place of primary evidence and was entitled to the same consideration. (*Bagley* v. *McMickle*,

9 Cal. 430; *Graham* v. *Campbell*, 56 Ga. 258.) The question as to the proper proof of the regular execution of the instrument, and the particularity of the testimony to establish its contents has been passed upon by various courts, where it was held that when a deed to real estate has been lost, and its loss and the contents thereof have been established, it will be presumed that it was executed in accordance with the formalities required by law. (*Christy* v. *Burch*, 25 Fla. 942; *Parks* v. *Caudle*, 58 Tex. 216; *Congdon* v. *Morgan*, 14 S. C. 587; *Heacock* v. *Lubuke*, 107 Ill. 396.)

Per CURIAM.—By this action in the nature of ejectment plaintiff seeks to recover possession of lots 9 and 10, block 64, of the city of Helena, whereof he alleges in his complaint ownership in fee and right of possession at all times since July 1, 1886, on which date, while plaintiff was such owner, and entitled to possession of said premises, defendant wrongfully entered and took possession of the same, and has ever since wrongfully withheld possession thereof from plaintiff, to his damage in the sum of fifty dollars; wherefore plaintiff demands judgment for possession, damages, and costs.

The issue raised by the answer of defendant is correctly stated in the brief of his counsel, as follows: "Defendant denies plaintiff's title, and alleges that the *locus in quo* is not a part of the original townsite of Helena, but of the N. E. ¼ of the N. W. ¼ of the N. E. ¼ of sec. 36, tp. 10 N., R. 4 W., of which defendant is the owner."

Before the trial plaintiff departed this life, and his administrators were substituted as plaintiffs in the action.

Upon the verdict returned by the jury judgment was entered in favor of plaintiff for recovery of possession of the premises described, one dollar damages, and costs; and defendant's motion for new trial was overruled, and he appealed from that order and the judgment.

The record raises for determination the following points:

1. It appears that decedent's title to lot 10 of said block was shown by the introduction of a deed of conveyance thereof, duly executed and delivered to him by the probate judge of Lewis and Clarke county, who held title to said townsite as

trustee. But to establish title to lot 9 in decedent it was sought to prove the contents of a deed claimed to have also been executed and delivered by said trustee, conveying said lot 9 to plaintiff, which deed was lost before the same was recorded. After certain preliminary proof was introduced as to the execution and delivery of said deed conveying lot 9 to decedent, the court permitted proof of its contents. On this point it is contended by appellant that sufficient foundation had not been laid for proof of the contents of the alleged deed as a lost instrument, because the evidence did not show sufficient search therefor to authorize the proof of its contents. The evidence produced on behalf of plaintiff in this regard is: 1. A record of the probate court, introduced in evidence without objection, which record recites that a deed of conveyance of said lot 9, block 64, of the townsite of Helena, was executed and delivered by the probate judge conveying the same to Benjamin C. Brooke on December 21, 1875; and 2. The testimony of witness John H. Shober, Esq., was introduced on behalf of plaintiff, to the effect that said deed was put into his custody by decedent, along with other papers for safe-keeping; that said witness, a lawyer by profession, carefully examined said deed at the solicitation of decedent, and from such examination testifies that the instrument was a good and sufficient deed of conveyance of said lot duly executed by said probate judge as grantor, to the decedent, Benjamin C. Brooke, grantee; that witness put into his safe said deed, with other documents belonging to decedent, for safe-keeping; that afterwards the office of witness Shober was burglarized, and his safe broken open, and certain papers and documents belonging to himself, as well as papers and documents belonging to decedent, were abstracted from said safe, and the deed in question could not be found after that event. As to search for said deed, this witness testifies that he made diligent search therefor in his office, on several occasions, at the request of decedent, and on other occasions decedent and witness searched in the latter's office together for said deed; and that they also went together and searched diligently therefor in the house of decedent; that, after Benjamin C. Brooke departed this life, witness Shober, along with one of the administrators of decedent, and also an heir of the dece-

dent, again made diligent search for said lost deed in places where they thought it might be found, which last search was made nine or ten months before the trial of this action. Said heir also testified to the fact of making the search last mentioned, and each witness testified that such diligent searching was unavailing to find said deed.

Witness Shober, while giving his testimony, stated that the person who burglarized his office, and abstracted from his safe certain papers, was an individual employed to take care of said office, and that, after arrest upon the charge of such burglary, said person confessed the same, and said he burned all the papers he took from the witness' safe. Defendant moved the court to strike out the statement of witness as to what said burglar confessed in regard to his disposition of the papers taken, which motion was overruled, and that ruling of the court is made the basis of an assignment of error, which assignment may conveniently be considered along with the main question as to the sufficiency of proof of the loss of said deed.

While the testimony of the witness as to what said person stated in respect to his disposition of the papers and documents taken from the office of witness Shober was hearsay, and, like many remarks made by witnesses, was objectionable from a technical point of view, still its effect was not so prejudicial as to be ground for reversal. At most, that statement bears upon the question of the loss or destruction of said deed, to lay the foundation for proof of its contents, which is a question addressed to the court as a matter of law. Whether sufficient foundation was laid for proof of the contents of said instrument is a question of law for the court to decide; and we are fully satisfied that the evidence produced, independently of the objectionable statement, was sufficient to justify the court in allowing proof of the contents of the lost instrument. The objectionable statement of the witness, therefore, being entirely addressed to the court, on a point fully supported, without regard thereto, was undoubtedly put out of consideration by the court in passing upon the point in question, as fully as though the court had excluded or stricken out said hearsay statement. Indeed, there was nothing in that statement to exclude from the jury, because there was nothing therein for

the jury to consider. Both the major and minor assignments mentioned are untenable.

It is further contended by appellant that the evidence offered on the part of plaintiff is insufficient to support the verdict, in that there is no proof that the lots in question are situate within the townsite of Helena, "according to the lines of said townsite established by the survey of Wheaton." While this may be true, the proof is clear and positive, by the testimony of surveyors showing competency and personal knowledge, that the lots in question are within the townsite of Helena as entered by the probate judge, trustee in that behalf, as shown by the patent issued to him therefor; and the evidence is equally positive that said lots in question do not lie within the parcel of ground described in the answer, by subdivisions of the United States survey, and alleged to be the property of defendant. All that appellant's point amounts to in this regard, therefore, is that, if those lots were not laid off and platted by Wheaton as part of the townsite of Helena defendant was at liberty to enter and appropriate them to his own use, notwithstanding said lots were a part of said townsite, and duly laid off and platted by authority of the proper public agents, but not by Wheaton, who appears to have first surveyed and platted at least a part of said townsite. The title of parties to parcels of land running to them from the United States by patent through mesne conveyances is not interrupted, broken, or divested, because, forsooth, the surveyor who surveyed or platted the same was of one name or another, so that the land in question is clearly and exactly identified, as in the present case.

It is further insisted by appellant that the court committed errors in giving and refusing certain instructions. This is equally untenable. The instructions, as given to the jury, fairly and adequately state the law applicable to the case, as developed in the pleadings and proof of the respective parties. There is no merit in the appeal. The judgment and order overruling defendant's motion for a new trial will therefore be affirmed.

Affirmed.

All concur.

STATE EX REL. HASKELL, ATTORNEY GENERAL, v. GREAT NORTHERN RAILWAY COMPANY.

[Submitted April 28, 1894. Decided April 30, 1894.]

MANDAMUS—*Jurisdiction to compel railroad to operate its lines.*—This court has no jurisdiction to issue a writ of *mandamus* to compel an interstate railroad, the employees of which have gone out on a general strike, to operate its line within this state upon a petition alleging that sufficient competent men are available and willing to serve said road for reasonable compensation.

ORIGINAL PROCEEDING. Application for writ of mandate. Denied.

Henri J. Haskell, T. J. Walsh, and *R. R. Purcell,* for Relator.

Per CURIAM.—Upon this petition the attorney general asks this court to issue a writ of *mandamus* addressed to and commanding the Great Northern Railway Company to operate its lines of railway in this state, as it had been accustomed to do prior to the thirteenth day of April, 1894, when such operations ceased altogether, as described in the petition, to the end that the public shall not be inconvenienced and damaged by deprivation of the use of this *quasi* public agency of commerce, travel, and communication.

In making this application counsel on behalf of the petition admit—a fact of general notoriety, too—that the cessation of operation of said railway was occasioned by a general refusal of the employees of said company engaged in operating the same up to that date to serve the company for the wages proposed to be paid, and because of the disagreement on that subject the employees on said lines went out on what is known as a general "strike," awaiting an adjustment of that controversy.

The petition alleges that sufficient competent, skillful, and experienced men are available, ready, and willing to serve said company in the operation of said road for reasonable compensation; and this is admitted to be the main predicate upon which a decision in this proceeding would turn if the court entertains the proceeding. It is therefore proposed that this court shall inquire and determine what would be a schedule of

reasonable wages for a corps of skilled and unskilled employees necessary to operate said railway, and then ascertain whether the requisite number of employees can be procured at the wages determined, and, if that fact is found to be true, as alleged, then command the operation of said railway under the penalties attached to disobedience of the writ of *mandamus*.

Those questions mentioned must be determined by the court upon proper inquiry whether the respondent should answer and traverse the allegations of the petition or no, because the court, before sending forth this extraordinary writ, will, by careful inquiry, become satisfied of its own jurisdiction, and that the conditions are such that the act commanded is feasible of performance.

If the proposed scheme is feasible, and the court has jurisdiction to carry it out, it evidently affords a remedy going far towards the solution of a problem of great moment to all parties concerned. But, aside from the relations of this property to interstate jurisdiction, as shown by the averments of the petition, already asserted by the United States courts to some extent, the difficulty is that this court does not at present possess jurisdiction for the arbitrament of the question involved, as aforesaid, and, having ascertained what is just in the premises, to enforce the same upon contending parties.

The time may come when the state, that is, the national government, by reason of its interstate jurisdiction, may, by proper provisions of law, come into the attitude of permanent trustee of such property so vitally related to the welfare of the whole people, instead of the occasional exercise of trusteeship by receivers, when the property has become financially swamped; and then the proper courts will be empowered to interpose an equitable authority in a threefold direction for the orderly correction of abuses existing towards employees and investors (minority as well as majority stockholders) of the vast capital involved in such property, and also towards the public as patrons thereof. For the reasons suggested, we must deny this application. The cases called to our attention lead to this conclusion also.

All concur.

STATE EX REL. MARION v. REYNOLDS, SHERIFF.

[Submitted April 30, 1894. Decided May 3, 1894.]

CRIMINAL LAW—*Stay of execution.*—The approval by the court, pending a motion for a new trial and for a stay of execution, of a bond conditioned for the defendant's appearance and obedience to all orders of the court does not by implication stay execution of the sentence, and the defendant may be lawfully imprisoned pending the determination of the motion for a new trial.

SAME—*Imprisonment for costs.*—When costs of prosecution are required by the statute under which a conviction is had to be included in the fine assessed, the defendant may properly be imprisoned under a judgment including such cost as part of the fine. (*State* v. *Sullivan*, 9 Mont. 494, cited.)

CONSTITUTIONAL LAW—*Selling liquor.*—Section 261, division 4, of the Compiled Statutes, prohibiting the sale of liquors in any place where women or minors are employed, is constitutional, being a proper exercise of police regulation.

APPLICATION for writ of *habeas corpus.* Petitioner remanded.

George Haldorn, and *C. L. Campbell*, for Relator.

Henri J. Haskell, attorney general, for the State, Respondent.

I. The act is constitutional. The right to engage in the occupation or business of keeping a beer hall, and engaging in the sale of liquor where women are employed for the purposes of the business therein carried on is not an inherent right of citizens. (*Ex parte Christensen*, 85 Cal. 213; *Ex parte Sing Lee*, 96 Cal. 359; 31 Am. St. Rep. 218; *In re Maguire*, 57 Cal. 605, 610; 40 Am. Rep. 125; *Ex parte Filchlin*, 96 Cal. 360; 31 Am. St. Rep. 223; *Crowley* v. *Christensen*, 137 U. S. 91; *McKinney* v. *State*, 3 Wyo. 727.)

II. It is not objectional as class legislation. (*Ex parte Ruback*, 85 Cal. 275; 20 Am. St. Rep. 226; *In re Ah Fong*, 3 Saw. 151; *Ah Kow* v. *Nunan*, 5 Saw. 564.)

III. It is a proper exercise of police power. (*Wynehamer* v. *People*, 13 N. Y. 451; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Oregier*, 138 Ill. 418; *Ex parte Hayes*, 98 Cal. 555.)

Per CURIAM.—This is an application for discharge from imprisonment, through the writ of *habeas corpus.*

It appears that relator was indicted and convicted under the provisions of section 261, page 578, of the Compiled Statutes, which reads as follows: "That hereafter it shall be unlawful

for any person or persons, company or corporation, to sell or dispose of any spirituous, vinous, or malt liquors in any room, hall, or other place where women or minors are employed or are allowed to assemble for the purpose of the business therein carried on." And the penalty of fine in the sum of three hundred dollars and costs, together with imprisonment sixty days in the county jail, was assessed as punishment, on the verdict of the jury. At the close of the trial, defendant announced his intention to move for a new trial, and thereupon moved the court to stay execution, pending determination of said motion, on defendant's giving a good and sufficient bond, to be approved by the court conditioned for his appearance, and obedience to all orders of court in the case. Thereupon, as disclosed by the record, defendant procured to be executed on his behalf a bond conditioned as mentioned, which was approved by the court, and filed; but, without granting any stay of execution, the court sentenced the prisoner according to the verdict, and ordered him into custody, for imprisonment, as provided by the judgment.

The first point insisted on by prisoner's counsel as ground for discharge is that by reason of having produced said bond, and the same having been approved by the court, and filed, the court, in effect, by implication, granted a stay of execution pending the determination of the motion for new trial; or, as otherwise stated, that the court, while retaining defendant's bond or stay, could not lawfully imprison him on the judgment during the pendency of said motion for new trial.

The facts shown hardly bear the interpretation insisted on by defendant's counsel. It does not follow that because certain things were done looking toward a stay of the execution, the court, by implication, had granted such stay. If so, the moving for some order which the court may grant or refuse, and the filing of a bond in the premises, which the court might readily approve if requested so to do, while still considering the propriety of granting the order sought, would commit the court as having granted the order moved for, unless the court made some special order, annulling the bond, to escape from the implication that the motion had been granted. This view is wholly untenable.

Secondly, it is affirmed that the imprisonment of defendant on this conviction is illegal because the judgment includes the cost of prosecution as part of the fine. By reference to the statute under which the conviction was had it will be seen that the costs of prosecution are required to be included in the fine assessed. Therefore, this objection is untenable. (*State* v. *Sullivan*, 9 Mont. 494.) Moreover, if the statute was so framed that the costs could not be properly included in the fine the prisoner would not, for that reason, be entitled to discharge at this time, because it appears that he is confined at present on the judgment for imprisonment independently of the fine.

Thirdly, petitioner's counsel urge the proposition that the provisions of said statute are unconstitutional because, in effect, it prohibits a certain class, *i. e.*, women, from being employed in a place where intoxicating liquors are sold, and therefore restrains such persons from engaging in a lawful employment. This statute does not forbid the employment of women or minors, but it does prohibit all persons and companies from selling intoxicating liquors in a place where women or minors are employed or assembled for the purposes of the business. There appears to be wisdom and propriety in this provision, as a police regulation, and we fail to find in it the infringement of any provision of our constitution. The California court, in cases cited on this point, had under consideration constitutional provisions which are not found in the constitution of this state, and which also appear to have been greatly modified by revision of the California constitution since the cases relied on were decided.

Other points were urged, relating to procedure, which are not pertinent to the inquiry on *habeas corpus*. Besides, the record of court proceedings is not properly before us in this proceeding. (*In re McCutcheon*, 10 Mont. 115.)

Finding no ground for discharge of petitioner he must be remanded to custody, and the order of this court will be entered accordingly. Prisoner remanded.

All concur.

SIMPKINS, RESPONDENT, v. SIMPKINS, APPELLANT.

[Submitted November 24, 1893. Decided May 7, 1894.]

JUDGMENT BY DEFAULT—*Divorce—Motion to vacate.*—Refusal to vacate a default judgment in a divorce case upon motion is an abuse of discretion where it appeared that defendant, who was a nonresident, immediately upon receiving the summons employed counsel where she lived, who at once wrote to a local attorney inquiring whether he would appear for defendant; that the latter appeared in the case, but, after securing plaintiff's acceptance of a compromise as to alimony which he understood he was authorized to offer on behalf of defendant wrote that he would withdraw from the case unless such compromise was accepted by defendant; that defendant refused such proposed compromise by telegraph, and followed the same with letters explaining such refusal, but which were returned unopened; that upon receipt of such message he declined to file defendant's answer which he had in his possession, and which disclosed a meritorious defense; and, refusing to take further action suffered the case to go by default. Nor would the merits of the motion be affected by the fact that the plaintiff had remarried immediately after such judgment; the condition of the parties to such marriage not being of defendant's creation.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for divorce. Defendant's motion to vacate the judgment was denied by DURFEE, J. Reversed.

Statement of the case by the court.

This is an action for divorce, commenced by filing complaint March 23, 1892, in the third judicial district court in and for Deer Lodge county, the plaintiff alleging that he was a resident of that county. It appears that defendant was at the city of La Crosse, Wisconsin, at the time of the commencement of the action. The service of summons was by publication, and by mailing a copy thereof to defendant at La Crosse. Demurrer was filed April 22d, by H. R. Whitehill, attorney for defendant. The demurrer was heard and overruled August 13th. No further pleading being filed by defendant, on August 14th her default was entered for failure to answer, and proof was heard upon the part of plaintiff, and judgment dissolving the bonds of matrimony between plaintiff and defendant was made and entered. On September 22d a motion was made by defendant to set aside the judgment, open the default, and allow her to defend the action. On that motion an answer was tendered, which apparently pleaded a good defense to the

cause of action set up in the complaint. Her motion was by the court denied. From this order she appeals.

It will be necessary to state somewhat fully the facts upon which the motion was based. The defendant filed her own affidavit, setting forth what she claims was her diligence in attempting to defend the case, and she annexed to said affidavit the correspondence between her attorney, W. S. Burroughs, in La Crosse, Wisconsin, and H. R. Whitehill, in Deer Lodge, Montana. Her affidavit was not contradicted except in one matter, which is noticed in the opinion below. From this affidavit, and the letters annexed, the following facts appear: Immediately upon receipt by her, through the mail, of a copy of the summons, she went to W. S. Burroughs, an attorney in La Crosse, Wisconsin, and employed him as her counsel. It appears that she was cognizant of the whole correspondence which afterwards took place between Mr. Burroughs and Mr. Whitehill. Mr. Burroughs at once (on April 19th) wrote to Mr. Whitehill (having obtained his name from the legal directory), and stated the fact of the commencement of the action, and inquired whether Mr. Whitehill would appear in the case for defendant as local attorney. In this letter he informed his correspondent of the condition of defendant and the number of her children, and something of her circumstances and marital history.

To this letter Mr. Whitehill sent the following answer:

"DEER LODGE, MONTANA, April 21st, 1892.

"*Wm. S. Burroughs, Esq.*,

"DEAR SIR: Your letter of the 19th inst. is just received. I will look up the complaint in *Simpkins* v. *Simpkins*, and put in an appearance for Mrs. Simpkins so as to prevent a default being taken against her. In case of a contest in the matter I shall charge $250.00. A portion of that, however, can be collected from the husband. In case we can make a settlement and procure an allowance for Mrs. S.'s support without trial I shall charge $100.00. If Simpkins is so very determined to have the divorce it is very likely that Mr. Titus will make some offer here when he finds an appearance has been made. In the mean time you might notify me of the facts as to the desertion, which you say is the ground

alleged for divorce, and also what amount Mrs. Simpkins would accept as alimony. Yours very truly,

"H. R. WHITEHILL."

(Mr. Titus was plaintiff's attorney.)

In accordance with this letter of April 21st, Mr. Whitehill on the next day filed a general demurrer on the part of defendant. To this letter Mr. Burroughs, on May 2d, replied substantially as follows: That his client would not be able to pay the amount charged by Mr. Whitehill. He then asks whether he cannot go on with the case, and gets his fee by virtue of an order of the court for counsel fees against the plaintiff. He discusses the procedure for obtaining such order quite at length. Then he sets forth the facts of defendant's defense.

The cause of action set up in the complaint is desertion solely.

In this letter Mr. Burroughs set out fully the facts which he claims showed that there was no desertion. He states that such facts can be proved, and says that depositions will be taken at La Crosse to prove the same. He thus furnishes the Deer Lodge counsel the material for preparing an answer. As to what the defendant would be willing to accept as alimony, her La Crosse counsel, in this letter, says: I think as she now looks at the matter, if he would pay you, and send to her $1,000.00, she would let him go. Have the kindness to write me that you have appeared and prevented default."

In reply to this letter of Mr. Burroughs, Mr. Whitehill, on May 26th, writes, and, after apologizing for some delay, says: "The case stands on a general demurrer, which Mr. Titus does not seem anxious to get rid of, so there has been no hurry. I shall look out for the case, and see that no advantage is taken of Mrs. Simpkins, and in the course of a couple of weeks, when this term of court adjourns, will prepare the answer necessary, and send you for Mrs. Simpkins to verify."

Pursuant to this letter, on July 7th, Mr. Whitehill sends the following:

"*Wm. S. Burroughs, Esq.*,

"DEAR SIR: Inclosed I send you answer in *Simpkins* v. *Simpkins* for verification before a notary public. Our next term of court begins on the 18th inst. Please return the

answer at once. At the time of filing I will have citation issued for Simpkins to show cause, if any, why alimony *pendente lite* should not be allowed, and have an order made for expenses and attorney's fees.

"Yours truly,

"H. R. WHITEHILL."

Upon receipt of this answer Mr. Burroughs had it verified at once, and on July 11th forwarded it to Mr. Whitehill. On July 9th Mr. Whitehill advised Mr. Burroughs of some negotiation of compromise as to alimony, talked of between him and Simpkins' attorney. To this letter Mr. Burroughs replies that his client cannot accept a $1,000 alimony; that she has no means of her own, and has two minor children, one 17 and one 19 years of age. He says that the defendant wishes to resist the divorce, but, if it is to be granted, she cannot get along upon $1,000, and makes the following proposition, which she, through Burroughs, in this letter, authorizes Mr. Whitehill to make, namely, that she will accept $2,000 for herself and the payment of Mr. Whitehill's fees, or the plaintiff may pay her $1,000, and secure her in some way the payment of $25 a month towards the support of her daughter, who is 17 years old, until she shall became of age, which in Wisconsin is 21 years.

To this letter Mr. Whitehill replies, on July 24th, as follows:

"DEER LODGE, MONTANA, July 24th, 1892.

"*Wm. S. Burroughs, Esq.*,

"DEAR SIR: I am surprised at your letter of the 16th inst. stating that Mrs. Simpkins now demands $2,000. Some time ago Mr. Titus came to me and offered $500 and $25 per month alimony during the minority of the youngest child. (Full age for females here is 18 years.) I told him that I could not settle on such terms, but that, if he would pay Mrs. Simpkins $1,000 cash, and my fee, I would allow him to enter judgment. I gave him time, at his request, to see Simpkins. He came back in a few days after; and said that Simpkins could only raise $500; that he would pay her that amount only, and no alimony, but would pay my fee. I told him again no, but that, if he would pay Mrs. S. $1,000, I would reduce my fee to $100, making $1,100, and costs of

court. At that time Mrs. Simpkins' answer had not been returned, so I told Mr. Titus that, unless my proposition was accepted by the 23d instant, I would file the answer, and cite Simpkins to appear and answer why an order of court should not be made compelling him to pay attorney's fee and alimony *pendente lite.* He agreed to see Simpkins again, but said: 'I know Simpkins has not got that much money, but he may be able to borrow it.' Yesterday Mr. Titus came again, and said Simpkins had arranged to borrow $500, but I told him Mrs. Simpkins now wants $2,000. Now, I was authorized by your letter of May 2d to settle with Simpkins for $1,000 cash and my fee. I am satisfied that he has no money or property that we can reach at all, and that, in case of a contest, Mrs. Simpkins can get nothing at all. Even were we to get a decree for alimony none can be collected. Simpkins would simply resign his position as conductor, and go off to some other state. But I do not propose to bother with Mrs. Simpkins' case any further. If she wishes to take $1,000, and let Simpkins take a divorce, she can get it. If not, I shall withdraw from the case, and you may arrange at once for some other attorney to appear for her here. I shall not file the answer at all. Simpkins will simply dismiss his case here, refuse to pay her any thing, and make application in some other court, where she can get no notice of the proceedings, and he will get his divorce without paying her one cent. Answer at once by telegraph whether this offer is accepted or not.

"Yours truly,

"H. R. WHITEHILL."

Burroughs then, on July 28th, telegraphs as follows:

"*To H. R. Whitehill, Attorney, Deer Lodge, Montana:* No; Mrs. Simpkins will not accept. File answer and application for alimony, as promised in your last letter. I will write to-night. WM. S. BURROUGHS."

Upon receipt of this telegram Mr. Whitehill declined to file the answer which had been prepared by him, and refused to have anything further to do with the case, and so informed plaintiff's attorney.

On July 28th, the day of sending the above telegram, and also on August 17th and August 29th, Mr. Burroughs wrote

to Mr. Whitehill at his regular Deer Lodge address, and these three letters came back to Burroughs, indorsed "Return to writer." In these three letters Burroughs urged Whitehill to go on with the case, and begs him at least to file the answer. During the time that these three letters were being written and forwarded and returned unopened to the writer the judgment was entered, of which defendant had no knowledge. On the 6th of August the demurrer was set for hearing for the 13th. On that day the demurrer was overruled, and defendant given twenty-four hours to answer. She was then in Wisconsin, and was unrepresented by counsel in Deer Lodge. At the expiration of this twenty-four hours her default was entered, and on the following day the judgment was entered. On the same day —the 15th of August—the plaintiff married another woman. Upon this showing the district court declined to set aside the judgment and open the default. The question before us is whether the court abused a sound discretion in denying this application.

Brazelton & Scharnikow, for Appellant.

The provisions of section 116 of the Code of Civil Procedure, upon which this motion is based are liberal in their terms, remedial in their character, and are designed to afford parties a simple, speedy, and efficient remedy in a most worthy class of cases. The power conferred thereby should be exercised by courts in the same liberal spirit in which they are designed, in furtherance of justice, so that cases may be tried on their merits. The exercise of the mere discretion of the court ought to tend, in a reasonable degree at least, to bring about a judgment upon the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion it is better, as a general rule, that the doubt should be resolved in favor of the application. (*Watson* v. *San Francisco etc. R. R. Co.*, 41 Cal. 20; *Cameron* v. *Carroll*, 67 Cal. 500; *Dougherty* v. *Nevada Bank*, 68 Cal. 275.) When a party applies promptly for relief after he has notice of the judgment, and has not been guilty of gross laches, and his affidavits and answer present a meritorious defense, the court should not hesitate to set aside a default and allow him to file his answer.

(*Buell* v. *Emerich*, 85 Cal. 116; *Reidy* v. *Scott*, 53 Cal. 69; *Haggerty* v. *Walker*, 21 Neb. 596; *Griswold Linseed Oil Co.* v. *Lee*, 1 S. Dak. 531; 36 Am. St. Rep. 761; *Taylor* v. *Trumbull*, 32 Neb. 508; *Malone* v. *Big Plant Mining Co.*, 93 Cal. 384.)

Rogers & Rogers, for Respondent.

The decree was fairly obtained; there is no pretense that plaintiff perpetrated a fraud upon defendant or in any manner imposed upon the court. In such cases the decree of divorce will not be set aside and the defendant allowed to answer to the merits of the action. (2 Bishop on Marriage, Divorce, and Separation, §§ 1533–35; *Davis* v. *Davis*, 30 Ill. 180–84; *Lewis* v. *Lewis*, 15 Kan. 181; *Rouse* v. *Rouse*, 47 Iowa, 422; *Whiting* v. *Whiting*, 114 Mass. 494; *Brown* v. *Brown*, 59 Ill. 315; *Holbrook* v. *Holbrook*, 114 Mass. 568; *Greene* v. *Greene*, 2 Gray, 361; *Lucas* v. *Lucas*, 3 Gray, 136.) The negligence of counsel is not cause for vacating a judgment. (*Haight* v. *Green*, 19 Cal. 118; *Mulholland* v. *Heyneman*, 19 Cal. 605; *Ekel* v. *Swift*, 47 Cal. 620; *Smith* v. *Tunstead*, 56 Cal. 175.)

Per CURIAM.—The motion of defendant in this case to open the default was upon the ground of alleged excusable neglect on her part. The Code of Civil Procedure provides that "the court may . . . . relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." (§ 116.)

Defendant contends upon her motion that, if there were any neglect on her part in allowing default and judgment to go against her, it was excusable. It is perfectly evident from all the facts shown by defendant's affidavit, and by the correspondence between her counsel in La Crosse and Deer Lodge, that she was anxious to defend this action. There is nothing whatever looking to any intention to neglect it or allow it to go by default. Her attitude was that of vigilance from her very first knowledge of the commencement of the action up to the time when she learned that the judgment had been rendered. At that time she came at once from Wisconsin to Deer Lodge, a distance of one thousand two hundred miles, and

promptly commenced proceedings for the purpose of setting aside the judgment and obtaining leave to defend the action. She had at once, upon receiving the summons by mail, consulted an attorney at her home in Wisconsin, and through him had secured the services of an attorney at Deer Lodge. She was cognizant of the letters written by Mr. Burroughs to Mr. Whitehill. From them it clearly appears that she was extremely vigilant and attentive to every step in the case. When finally the judgment was rendered against her she had at that time a verified answer in the hands of her Deer Lodge attorney, setting up a complete and meritorious defense.

Wherein was defendant's negligence? It was sought to be argued that it was in not at once employing other counsel upon the receipt by her of Mr. Whitehill's letter of July 24th, in which he said that unless she accepted certain terms of compromise, which he set forth, he would have nothing more to do with the case. It appears by Mr. Titus' affidavit, in contradiction of defendant, that at this time the defendant and her La Crosse attorney knew the names of Deer Lodge attorneys other than Mr. Whitehill. It is claimed by plaintiff that it was negligence in defendant, in that upon the receipt of this letter she did not at once employ some one else. But it must be remembered that Mr. Whitehill then had charge of her case, and that he had in his possession the verified answer which she had sent to him to file. Furthermore, Mr. Whitehill never informed defendant that he had withdrawn from the case. He had simply told her that he would do so if she did not accept those certain terms, which she claims she had never authorized him to offer to plaintiff. The most that appears is that Mr. Burroughs had said at one time that he thought those terms might be accepted. Burroughs telegraphed for Mrs. Simpkins, to Whitehill, that she did not accept the terms, and requesting Whitehill to file the answer and go on with the defense. Then it was that Burroughs wrote fully, setting forth, by reference to the correspondence, that defendant had not authorized the offer which Whitehill thought he had power to make. This was July 28th. This letter Mr. Whitehill never opened. Nor did he open the two others which followed it; but, on the other hand, he returned them unopened to the

writer. We are of opinion that the defendant and her La Crosse representative had reason to expect at least that these letters would be opened and read by Mr. Whitehill. They explained fully that the offer which Mr. Whitehill claimed that he was authorized to make to plaintiff's attorney had not been so authorized. The defendant had the right to believe that when Mr. Whitehill received these letters he would read them, and that, having read them, their contents would lead him to file her answer, or place her in some position to secure other counsel, or at least notify her of his withdrawal from the case.

No question was raised as to Mr. Whitehill's fees, and, the defendant having the right to believe that her Deer Lodge counsel would read the letters following July 28th, there was no reason apparent to her why he would leave her in default. If Mr. Whitehill had read the unopened letters he would have read therein the defendant's statements that he (Whitehill) was mistaken when he considered that he was authorized to make the offer to plaintiff's attorney which he mentions in his letter of July 28th, and the nonconcurrence in which proposition by defendant was the cause of Whitehill's threatened withdrawal. Then Mr. Whitehill, or any other fair attorney, if he still persisted in withdrawing from the case, would have notified defendant, and put her in a position not to suffer a default by his withdrawal. That is to say, this is what defendant, sitting in her home at La Crosse, one thousand two hundred miles from the court, had reason to believe; and, so having reason to believe, she was not negligent in acting as if she so believed.

We can see no negligence whatever of defendant which was not absolutely excusable; and indeed it is difficult to find any negligence on her part at all.

Under all these facts of the case we are of opinion that it would be a reproach upon the administration of the law to allow this judgment to stand. Divorce laws and procedure in some jurisdictions are often a subject of adverse criticism. If such a proceeding as the one before us is allowed to pass with approval or unchallenged such criticism would be wholly just.

It is urged that the merits of the motion are affected by the fact that plaintiff has remarried since the rendering of the divorce judgment. Yes, plaintiff has remarried, according to the record, and he did this before the ink was dry upon the judgment divorcing him by default from the woman who had been his wife for twenty-five years, who had borne his children and reared them to near their majority, and who had kept the home and hearth for him and his children during all these years. And this judgment, obtained without a hearing on the part of defendant, was upon a complaint not charging cruelty or adultery, or any of the graver offenses against the marriage contract, but upon a complaint alleging desertion only, and a desertion after twenty-five years of married life—a charge by plaintiff, upon the truth of which all the circumstances of this case throw the gravest suspicion. In this connection it is appropriate to notice the verified answer which was tendered with the motion. That answer not only denies the allegation of desertion, but it emphatically denies that plaintiff is a resident of the state of Montana, and it sets up facts which, if true, show that he is a resident of the city of La Crosse, Wisconsin. It alleges that the plaintiff was a railroad conductor, and that he was employed in different places, and that, after having had many homes at divers times, they finally settled in this home in La Crosse; that plaintiff always treated it as such, and that he spoke of it as such in the letters which he wrote to defendant and his children; that he wrote to them in affectionate terms, and visited them up to a short time before commencing this suit, and up to that time sent them money and presents; and that never did he intimate his claim of defendant's alleged desertion, or of his intention to claim a residence in Montana. Now, under all these circumstances, for plaintiff to claim that his remarriage, in this hot and indecent haste, is pertinent upon this motion is a sorry sort of a reply to the motion of defendant setting up the pitiable facts disclosed by this record. Nor is the situation of the person whom plaintiff purported to marry on August 15th a consideration that can set aside the rights of this defendant. Such condition is not of defendant's creation or her fault.

The order denying the motion to open the default is reversed, and the case is remanded, with directions to the district court to grant the application, and to set aside the judgment, and allow defendant to file her answer and make defense.

Reversed.

All concur.

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STATE, EX REL. NIXON v. SECOND JUDICIAL DISTRICT COURT ET AL.

[Submitted May 10, 1894. Decided May 14, 1894.]

ALIMONY—*Order not reviewable on certiorari or habeas corpus.*—An order requiring the payment of alimony by a defendant in a divorce case is a judgment from which an appeal will lie, and therefore neither *certiorari* nor *habeas corpus* are available to review the action of the court in imprisoning the defendant for contempt in disobedience of such order.

SAME—*Remedy where party unable to pay.*—One who has become unable to pay alimony adjudged against him in a divorce case may institute proceedings seeking a modification of the judgment under section 1004, division 5, Compiled Statutes, allowing the court from time to time to make such alterations in the allowance of alimony as shall appear reasonable and just.

APPLICATION for writ of *certiorari* in aid of *habeas corpus.* Writ denied.

John W. Cotter, for Relator.

George Haldorn, and *Oliver M. Hall,* for Respondents.

Per CURIAM.—This is an application for a writ of *certiorari* to review the action of the district court in committing the relator to jail for contempt in disobedience of an order compelling him to pay alimony *pendente lite* to the plaintiff in the divorce action of May Nixon against the relator. This application is made in aid of an application of a writ of *habeas corpus,* in which relator alleges that he is unlawfully imprisoned by virtue of the order of the district court, committing him for contempt, as above recited.

In that divorce action the court made an order that the defendant (relator herein) pay to plaintiff as alimony *pendente lite* forty dollars a month, and as counsel fees sixty dollars. This alimony was paid for some months, and no appeal was

taken from the order; nor does relator now complain that the order as originally made was wrong in any respect. But the alimony was not paid for the month of March, nor since that time. Relator was accordingly cited in the district court to show cause why he should not be punished for contempt for the nonpayment of the same. On that hearing he recited facts which he claimed showed his inability, or his want of faculty, to pay the alimony. Notwithstanding this attempted showing on his part, the court ordered him imprisoned until the order for alimony was obeyed. This imprisonment relator alleges was illegal, and on this writ of *certiorari* he asks us to review the action of the district court in ordering him imprisoned on such contempt proceedings. He also asks a discharge on his application for a writ of *habeas corpus*.

The order to pay alimony *pendente lite* was a judgment which was appealable. (*In re Finkelstein*, 13 Mont. 425.) No appeal was taken by defendant in the divorce case from that order or judgment. When that judgment was rendered, it must be presumed that the court passed upon and decided the matter of defendant's faculty to pay the alimony; that is to say, that action of the court adjudicated two matters: 1. That the defendant should pay such sum as alimony; and 2. That he had the faculty to pay it. That judgment remained unattacked when the contempt proceedings were taken which resulted in this present imprisonment of the relator. That order for alimony was a judgment, and had the characteristics and attributes of a judgment. A judgment cannot be attacked, as it was sought to do in this case, by presenting affidavits on a proceeding seeking to enforce such judgment. When the affidavits were presented on the contempt proceeding, there stood against the defendant a valid unchallenged judgment, requiring him to pay the alimony, as therein set forth. If he considered that judgment was wrong originally he could have appealed therefrom. But, as above noted, he never appealed from that judgment, and does not even now contend that it was not properly rendered; but he urges before us at this time that when the contempt proceedings were taken in the district court circumstances had arisen, and changes in his affairs had taken place, which rendered a compliance with the judgment

at that time—March, 1894—impossible. But he could not urge or present those facts while the integrity of the judgment was allowed to remain unassailed. It was practically attempting to avoid a judgment or order by *ex parte* affidavits in a proceeding not directed against the judgment. If the defendant in the divorce suit (relator herein) had become unable to pay the alimony adjudged against him he had a remedy. A court would not imprison him for his inability or want of faculty to pay the alimony; but his remedy is not by *habeas corpus* or *certiorari*. He should have sought a modification of the judgment for alimony by a proceeding for that purpose. The alimony was *pendente lite*. The court had continuing jurisdiction over that subject, and over the person of defendant in that case. If any doubt could be presented as to this being the law generally, that doubt would be resolved by our statute, which provides, in reference to divorces, that the court "may also grant alimony *pendente lite;* and the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance as shall appear reasonable and just." (Comp. Stats., div. 5, § 1004. See, also, 1 Bishop on Marriage & Divorce, §§ 489–93.) If the relator herein had made a regular application for a reduction of the alimony to the district court in which the suit was pending he could have presented all of this showing as to his want of faculty to pay the alimony, and plaintiff could have rebutted such showing, and the court would then have determined whether the alimony should be reduced. On such determination an order would be made, from which the defendant could have an appeal, and on such appeal this court would have made a review.

But as the matter is now before us the question of reduction of the alimony has never been tried or determined in a proper proceeding by the district court, nor was there opportunity offered to so try and determine. The court acted within its jurisdiction. It had jurisdiction to make the original order for alimony. That order had never been set aside or attacked by proper proceeding, and the court certainly had jurisdiction to enforce its order.

The order of commitment therefore appearing to be warranted by the proceedings as shown on return to the writ of *certiorari*, and no ground being shown to warrant the prisoner's discharge, he must be remanded to custody, and judgment will be entered accordingly. The prisoner is therefore remanded.

All concur.

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STATE, RESPONDENT, v. ENGLISH, APPELLANT.

[Submitted May 7, 1894. Decided May 14, 1894.]

LARCENY—*Former acquittal—Res judicata.*—Where defendant and another stole a steer from the herd of one owner, and about an hour after stole a cow from the herd of another owner, driving both off together, the stealing of each animal was a complete and independent offense, and an acquittal as to the theft of the steer is not a bar to a prosecution for the theft of the cow. Nor is the defense of an *alibi*, established upon the trial for larceny of the steer, *res judicata* that defendant was not present when the cow was stolen.

EVIDENCE—*Confessions of accomplice.*—Confessions by an accomplice in crime not made in the presence of the defendant, nor during the commission of the offense or in its furtherance, and not part of the *res gestæ*, are inadmissible against the defendant.

Appeal from Eighth Judicial District, Cascade County.

CONVICTION for larceny. Defendant was tried before BENTON, J. Reversed.

Douglas Martin, Ed L. Bishop, and *J. G. Bair,* for Appellant.

I. It must be conceded in this case that the steer, of the stealing of which appellant was acquitted, and the cow, for the stealing of which he is now prosecuted, were taken by the same two persons upon the same occasion; that the taking and driving away of the two animals was all one transaction, and that they were taken under such circumstances that the defendant could not be guilty of the larceny of the one and not guilty of the larceny of the other. (*State* v. *Cooper*, 13 N. J. L. 361; 25 Am. Dec. 490; *State* v. *Colgate*, 31 Kan. 511; 47 Am. Rep. 509; *Lander* v. *Arno*, 65 Me. 26; Bishop's Criminal Law (1892), 937; *State* v. *Thurston*, 2 McMull. 382; *Phillips* v. *State*, 85 Tenn. 551; *Roberts* v. *State*, 14 Ga. 8; 58

Am. Dec. 528; *Wilson* v. *State*, 45 Tex. 78; 23 Am. Dec. 602; *Copenhaven* v. *State*, 15 Ga. 264; *Lorton* v. *State*, 7 Mo. 59; 37 Am. Dec. 179; *State* v. *Hennesey*, 23 Ohio St. 339; 13 Am. Rep. 253; *State* v. *Nelson*, 29 Me. 335; *Fulmer* v. *Commonwealth*, 97 Pa. St. 506; *State* v. *Paul*, 81 Iowa. 596; *State* v. *Larson*, 85 Iowa, 659; *Rex* v. *Bleasdale*, 2 Car. & K. 765.) "To constitute simultaneousness it is not necessary that there should be exact coincidence in a particular point of time." (Wharton's Criminal Evidence, § 589; Wharton's Criminal Law, § 931.) In determining whether a transaction constitutes more than one offense, the ownership of the articles stolen is immaterial. (*Hoiles* v. *United States*, 3 McAr. 370; 36 Am. Rep. 106; *Lowe* v. *State*, 57 Ga. 171; *State* v. *Morphin*, 37 Mo. 373; *Lorton* v. *State*, 7 Mo. 59; 37 Am. Dec. 179; *State* v. *Newton*, 42 Vt. 537; Rapalje's Criminal Procedure, 159; *Nichols* v. *Commonwealth*, 78 Ky. 180; Bishop's New Criminal Law, 637; *Wilson* v. *State*, 45 Tex. 78; 23 Am. Dec. 602; Wharton's Criminal Evidence, § 588.) The prosecution whenever it is at liberty to join in one indictment all articles simultaneously stolen may be treated, when it selects one of them for trial, as barring itself from indicting for the others. (Wharton's Criminal Pleading and Practice, 340; note to *Roberts* v. *State*, 58 Am. Dec. 539.)

II. Even though the judgment of acquittal be not a bar to this action, still if the record shows that the particular controversy sought to be concluded was necessarily tried and determined, or that the verdict could not have been rendered without deciding that matter, then such judgment is conclusive evidence, and the prosecution was estopped to assert the contrary. (*State* v. *Dewey*, 65 Vt. 196; *Kleinschmidt* v. *Binzel*, 35 Pac. Rep. 464, 465; *ante*, p. 31; Herman on Estoppel and Res Judicata, §§ 106, 111.) The only defense made by appellant in the case in which he was acquitted, was an *alibi*—that he was not present when the two animals were together driven away, and was not one of the two persons who drove them away, and in finding him not guilty the jury necessarily passed upon and decided that question. There was no other possible ground that they could find him not guilty upon, and the con-

clusion is inevitable. "A judgment is conclusive upon every matter actually and necessarily decided in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must now be taken as conclusively settled." (Freeman on Judgments, §§ 256, 258. See, also, *Russell* v. *Place*, 94 U. S. 606; Herman on Estoppel and Res Judicata, §§ 105, 226, 227; *Tuska* v. *O'Brien*, 68 N. Y. 449; *Pray* v. *Hageman*, 98 N. Y. 358; Bigelow on Estoppel, 110.)

III. The act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act or declaration of all, and is evidence against all. Each is deemed to assent to or command what is done by any other in furtherance of the common object. (Wharton's Criminal Law, § 702.) The act or declaration must be done or made during the pendency of the conspiracy, in pursuance of the common design and in furtherance of its objects. (*Brown* v. *United States*, 150 U. S. 93; 1 Greenleaf on Evidence, § 111; *People* v. *Moore*, 45 Cal. 19; *People* v. *Stanley*, 47 Cal. 114; 17 Am. v. *Moore*, 45 Cal. 19; *People* v. *Stanley*, 47 Cal. 114; 17 Am. Rep. 401; Wharton's Criminal Evidence, 598; Rapalje's Criminal Evidence, 254.) Acts or declarations not done or made during the pendency of the conspiracy to carry out the design are inadmissible against a co-conspirator. (*Luttrell* v. *State*, 31 Tex. Cr. Rep. 493.) The distinction between acts or declarations done or made in furtherance of the common design, and those not so made, is illustrated clearly in the following decisions: *State* v. *McGee*, 81 Iowa, 17; *Patton* v. *State*, 6 Ohio St. 470, 471; *Samples* v. *People*, 121 Ill. 547. Statements as to measures taken in the execution or furtherance of any such common design are not relevant. (7 Am. & Eng. Ency. of Law, 49, note 1; *Logan* v. *United States*, 144 U. S. 263; *New York Guar. & Ind. Co.* v. *Gleason*, 78 N. Y. 514, 515.) Mere narratives of past events are not admissible. (1 Greenleaf on Evidence, § 111; *People* v. *Aleck*, 61 Cal. 138; *People* v. *English*, 52 Cal. 211; *People* v. *Dilwood*, 94 Cal. 89; *People* v. *Irwin*, 77 Cal. 504.)

Attorney General Henri J. Haskell, for the state, Respondent.

I. The defendant's plea of *autrefois acquit* is not a good plea in bar to this information. (*Price* v. *State*, 19 Ohio, 424; *State* v. *Williams*, 45 La. Ann. 936; *Commonwealth* v. *Roby*, 12 Pick. 496; *Ashton* v. *State*, 31 Tex. Cr. Rep. 482; *Reddick* v. *State*, 31 Tex. Cr. Rep. 587; *People* v. *Kerm*, 8 Utah, 268; *Commonwealth* v. *Bakeman*, 105 Mass. 53; *Wright* v. *State*, 17 Tex. App. 152; *Alexander* v. *State*, 21 Tex. App. 407; 57 Am. Rep. 617; *Harrington* v. *State*, 31 Tex. Cr. Rep. 577; *Keeton* v. *Commonwealth*, 92 Ky. 522; *Winn* v. *State*, 82 Wis. 571; *Commonwealth* v. *Fredericks*, 155 Mass. 455; *State* v. *Horneman*, 16 Kan. 455.) In *Territory* v. *Willard*, 8 Mont. 332, the court defines the rule by which the correctness of the plea of *autrefois acquit* can be tested, as follows: "Where the evidence necessary to support the several indictments would have been sufficient to procure a legal conviction upon the first the plea is generally good, but not otherwise." (Comp. Stats., § 313, div. 3.)

II. The second point contended for by appellant must depend, if decided in his favor, upon the law of *res judicata* laid down in civil cases. The authorities cited by the state upon the first point are conclusive upon the second raised by the defendant. In order to successfully plead *res judicata* the record in the first case must be before the court in this case. (*Russell* v. *Place*, 94 U. S. 606; *Aiken* v. *Peck*, 22 Vt. 260; *Hooker* v. *Hubbard*, 102 Mass. 245.)

Per CURIAM.—The defendant appeals from the judgment convicting him of the crime of larceny of one cow. The judgment must be reversed upon one of the points argued, but we will express our views upon some other questions raised, as it seems that they will necessarily be before the court again on a new trial.

The defendant was tried upon a plea of not guilty, and also upon the plea of *autrefois acquit*. The defendant and one Leslie De Witt were charged with stealing a cow, named in this information, and belonging to one Lars Waldeland. They were also charged with stealing a steer belonging to Charles

Carthrae. This defendant, English, was tried for the offense of stealing the steer, and was duly acquitted. He was then tried on the other information for stealing the cow, and was convicted. It is from the judgment on this conviction that he now appeals.

The acquittal on the charge of stealing the steer is what the defendant claimed as a former acquittal which barred this prosecution. His argument proceeds upon the theory that the taking of the steer and the cow was one act, and therefore there could be but one prosecution. On the trial of this information the evidence as to the taking of the animals was to the effect that De Witt and this defendant first cut out the steer from Carthrae's herd, drove it away some distance, and left it; that about half an hour or an hour afterwards they went to the herd of Waldeland, from half mile to a mile distant, and took the cow mentioned in this information, drove her to where they had left the steer, and then drove them both way. We are of opinion that there were clearly two acts and two offenses in these transactions. The takings of the two animals were at different times, and at different places, under different circumstances, and from different owners. Each was in itself an absolute, complete, and independent offense We cannot doubt that, if an information had set up what the facts showed in this case, namely, that these persons took, and drove away the steer of Carthrae, and half an hour or an hour later, and half a mile or a mile removed, took, and drove away the cow of Waldeland, a court would have held that the information was bad, in that it set up two offenses. But defendant here is informed against for stealing the cow only, and on the trial of that information he was not in jeopardy of a conviction for stealing the steer. It is said in the case of *Territory* v. *Willard*, 8 Mont. 328, quoting from Wharton: "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea of *autrefois* is generally good, but not otherwise." Applying that rule to the case at bar, it is clear that the evidence necessary to support the information for stealing the cow would not have been sufficient to procure a legal conviction upon the information for stealing the steer. (See, also, *Territory* v. *Stocker*, 9 Mont. 6.)

There can be no doubt that the plea of former acquittal in this case is insufficient. It should have been so determined as a question of law by the court.

Defendant also makes the contention that the judgment upon the trial for stealing the steer is *res adjudicata* in this: that the only defense made upon the trial was an *alibi* that the defendant being acquitted, it is *res adjudicata* that he was not present when the steer was stolen; and that the evidence in this case shows that the steer and cow were stolen together and therefore it was established as *res adjudicata* that defendant was not present when the cow was stolen. But we have heretofore shown that the stealing of the steer and cow were two offenses, committed at different times and places. The defendant, under the circumstances appearing, was not necessarily absent from the one stealing because he was absent from the other.

It seems, upon the argument of this case, that Leslie De Witt, the associate of defendant in these transactions, had, before the trial of this cause, been convicted and sentenced for his participation in these events. On this trial the court, over the objection of defendant, admitted in evidence testimony of the confessions made by De Witt, implicating him and defendant in the stealing of the cow. It is clear from the testimony that these confessions were not made in the presence of defendant, nor were they made during the pendency of the commission of the larceny, nor in its furtherance, nor were they part of the *res gestæ*. They were simply narrations by De Witt, after the larceny was completed, of the events which were past and accomplished. Under such circumstances the confessions of an accomplice, or of one of two persons charged with a crime, can be used as against the confessing person only. In the case at bar they were used as against the other person only. This was error. This is elementary, and ancient and modern law; and it is just. (1 Greenleaf on Evidence, §§ 111, 233; Wharton's Criminal Evidence, 8th ed., § 699; 3 Am. & Eng. Ency. of Law, 482, notes and cases; Wharton's Criminal Law, § 696; *People* v. *Moore*, 45 Cal. 19; *McGehee* v. *State*, 58 Ala. 360; *Commonwealth* v. *Thompson*, 99 Mass. 444; *Cable* v. *Commonwealth* (Ky.), 20 S. W. Rep. 220; *State*

v. *Donelon*, 45 La. Ann. 744.) See, also, cases cited by appellant. It is a matter of regret that prosecuting attorneys should insist upon, and the trial court permit, the introduction of illegal evidence, which must result in the reversal of cases, when such errors could be so easily avoided by a little reflection and research of the authorities.

The judgment is reversed, and the case is remanded for a new trial.

All concur.

Reversed.

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WAITE, RESPONDENT, v. VINSON ET AL., APPELLANTS.

[Submitted January 3, 1894. Decided May 14, 1894.]

PARTNERSHIP—*Constructive fraud—Sale of partnership property by one partner without consent of the other.*—A sale by one partner of a large portion of the firm property for the purpose of paying firm obligations, the proceeds of the sale being devoted to that purpose, though made without the concurrence of the other partner, but with his knowledge that a sale was contemplated, cannot be avoided as a constructive fraud at the suit of the nonconcurring partner, upon the mere showing that the vendee knew of the latter's interest in the property and want of consent, where the price paid was the full market value and the sale was highly beneficial to the interests of the firm.

EQUITY—*Fraudulent sale—Rescission—Tender of price.*—Where one partner seeks relief in equity from an alleged fraudulent sale of partnership property made by the other partner without his consent, where a fair price was obtained and the proceeds devoted to the liquidation of the firm obligations, he must first do equity by tendering to the vendee the price which he paid for the property. (*Maloy* v. *Berkin*, 11 Mont. 138, cited.)

Appeal from Tenth Judicial District, Fergus County.

ACTION for accounting and to rescind a sale. The cause was tried before DU BOSE, J. Plaintiff had judgment below. Reversed.

George W. Taylor, for Appellants.

I. A member of a copartnership may, without the consent of his copartner, dispose of the partnership property for the purpose of discharging the partnership debts, there being no assets on hand with which such debts can otherwise be paid. Where the copartner was absent from the state such a conveyance has been sustained in *Anderson* v. *Tompkins*, 1 Brock. 456;

McCullough v. *Sommerville*, 8 Leigh, 415; *Gordon* v. *Cannon*, 18 Gratt. 387. Also where the copartner was not absent from the state. (*Mabbett* v. *White*, 12 N. Y. 442; *Graser* v. *Stillwagen*, 25 N. Y. 317.)

II. The next question is, Was there any fraud on the part of Vinson, and was David an innocent purchaser? Fraud is the gist of the action, and we hold that having alleged fraud, it is incumbent on the plaintiff to show the same beyond doubt, and unless fraud is shown then he cannot maintain his action. One who alleges fraud must clearly and distinctly prove the fraud he alleges. (8 Am. & Eng. Ency. of Law, 654.) If a case of actual fraud be alleged relief cannot be had by proving constructive fraud. (8 Am. & Eng. Ency. of Law, 664, note 3; *Mount Vernon Bank* v. *Stone*, 2 R. I. 129; 57 Am. Dec. 709; *Piper* v. *Hoard*, 107 N. Y. 67; 1 Am. St. Rep. 785.) Fraud must be proved by evidence so clear and strong as to produce satisfactory conviction. (*Greer* v. *Caldwell*, 14 Ga. 207; 58 Am. Dec. 553.)

E. W. Morrison, for Respondent.

The copartnership was formed for the purpose of engaging in the sheep business. Consequently the transfer by Vinson was not in the usual course of the business of the firm, nor for carrying out the purpose for which the firm was organized. It was clearly not within the scope of his authority. In *Osborne* v. *Barge*, 29 Fed. Rep. 725, the court, after stating the general rule governing the authority of each partner, says: "But that, as to acts not in furtherance of the business of the partnership in the ordinary way, but which may put an end to the same, or the natural result of which is to take control and management of the firm business and property from the partners, it is necessary, to sustain the validity of such acts, that it appear that the same were done with the assent of all the partners." Indeed, the rule is well settled that the authority of each copartner to dispose of the property of the firm without the consent of his copartners extends only to the usual business of the firm. (Note to *Davies* v. *Atkinson*, 7 Am. St. Rep. 377; 1 Bates on Partnership, §§ 401, 404; 17 Am. & Eng. Ency. of Law, 987, 988, note 1; 2 Lawson's Rights,

Remedies, and Practice, §§ 646, 1216, note 1.) One partner has no implied power, without the consent of his copartner, to sell the property of the firm, upon the continued use of which the business of the firm depends. (Authorities cited, *supra;* 17 Am. & Eng. Ency. of Law, 1011, note 3; *Blaker* v. *Sands,* 29 Kan. 551; *Hunter* v. *Waynick,* 67 Iowa, 555; *Myers* v. *Moulton,* 71 Cal. 498; *Shellito* v. *Sampson,* 61 Iowa, 40; *McNair* v. *Wilcox,* 121 Pa. St. 437; 6 Am. St. Rep. 799; 1 Bates on Partnership, § 338; *Mayer* v. *Bernstein,* 69 Miss. 17; *Shattuck* v. *Chandler,* 40 Kan. 516; 10 Am. St. Rep. 227; *Lowenstein* v. *Flauraud,* 82 N. Y. 494; *Osborne* v. *Barge,* 29 Fed. Rep. 725; *Coleman* v. *Darling,* 66 Wis. 155; 57 Am. Rep. 253; *Steinhart* v. *Fyhrie,* 5 Mont. 463.)

Wade & Barrows, also for Respondent.

Per CURIAM.—The object of this action, brought by a member of a copartnership firm, as deduced from the pleadings, appears to be twofold.

1. To obtain dissolution of the copartnership existing, as alleged, between plaintiff and defendant Vinson, in the firm name of W. E. Vinson & Co.; to acquire an accounting, to ascertain and state the account of each member, touching their respective interests in and obligations to said firm; to provide for the payment of the firm's debts out of the assets thereof; and then to make division of the property or proceeds remaining, according to the respective interests of the copartners; and, in general, to wind up the affairs of said firm.

2. To cancel and set aside a sale of certain property of said firm, made by defendant Vinson, one member thereof, acting on behalf of the firm, to defendant C. C. David, not a member of said firm, which sale is alleged to be fraudulent and void for the reasons hereinafter set forth, as alleged in the complaint.

To the end that these purposes of the action might be effectual, plaintiff asked, and, on commencement of the action, obtained, appointment of a receiver to take charge of all the property of said firm, including the property sold to defendant David, and also obtained an injunction restraining defendants from interfering with the property in question.

The assignments of error brought up for consideration by this appeal relate entirely to the last-mentioned branch of the adjudication, namely, the cancellation of said sale, and dispossession of defendant David of those effects claimed to have been sold and delivered to him. As to the dissolution, accounting, payment of debts, and winding up of the affairs of said firm, the action appears to have been still pending in the trial court when the present appeal was taken from the judgment declaring said sale to defendant David null and void. Therefore, the proceedings, pleadings, evidence, and judgment relating to the cancellation of said sale, as shown by the record, will be reviewed upon the assignments specified in defendant's motion for new trial, which motion was overruled, and from which order, as well as the judgment, this appeal was taken.

The amended complaint, on which the action is founded, sets forth: That in November, 1890, plaintiff and defendant Vinson entered into a copartnership, on equal terms and shares, for the purpose of engaging in and carrying on the business of sheep ranching in Meagher county, Montana, under the firm name and style of W. E. Vinson & Co., and thereupon engaged in and continued such business until about October 25, 1892. That, during the continuance of said copartnership business, defendant Vinson has wrongfully applied to his own use, out of the receipts of said business, certain money, the amount of which plaintiff is unable to state, because said defendant has neglected and refused to account to plaintiff therefor, although often requested so to do.

"III. That on or about the twenty-fifth day of October, 1892, the said defendant W. E. Vinson, without the knowledge or assent of the plaintiff, assigned and transferred his interest in the said property of the said copartnership, being the property used for carrying on the business thereof, to the defendant C. C. David, who well knew of the plaintiff's interest therein, and who now claims to be the owner thereof, and who also claims, as the plaintiff is informed, to be the owner of the entire partnership property of the said firm, by purchase from the said W. E. Vinson; and that the said C. C. David, without the knowledge or consent of the plaintiff, has taken exclusive possession of the said property, and refuses

to recognize the plaintiff's interest therein, and is conducting the business thereof upon his own account, and threatens to deprive the plaintiff of his interest therein, and refuses to account to the plaintiff therefor. Since the said transfer the defendants have also taken possession of the books and stock and all effects of the said copartnership, and ever since have prevented the plaintiff from having access to the same, or from participating in any manner in the partnership business, to the plaintiff's great and irreparable injury and damage.

"IV. That the said sale and transfer was made for the purpose of defeating and defrauding this plaintiff, in this: That the said copartnership is indebted to this plaintiff, on account of moneys advanced by the said plaintiff to the said copartnership for the purpose of defraying the expenses and carrying on the business thereof, in the sum of three hundred (300) dollars over and above his share of the capital stock thereof, and also that the said copartnership is indebted in a large sum to other parties, for the payment of which the plaintiff is individually liable, all of which the defendant C. C. David well knew at the time of the sale and transfer."

Following these allegations, the complaint sets forth a list of the property of said firm, and demands judgment: 1. That said copartnership be dissolved, and that an accounting be taken, etc., according to the usual practice in such cases; 2. That a receiver of the property of said firm be appointed, clothed with the usual power in such cases; 3. That defendants be restrained by injunction from interfering with said property; 4. That the effects of the firm be sold, and its liabilities discharged, and the surplus, if any, divided between the parties according to their respective interests.

In reviewing a case on the assignment that the findings or decision is not warranted by the evidence it is necessary to refer to the complaint to see what has been alleged as ground for the relief sought and obtained by the decision, and what issue has been formed thereon by the other pleadings, as a starting point from which to review and consider the evidence on such assignment. In looking into the complaint for the grounds alleged for annulling said sale it is found that all the averments relating thereto are comprised in paragraphs 3 and

4, quoted above, wherefrom it will be observed that while there are undoubtedly sufficient facts alleged to support an action for dissolution, accounting, and division between the copartners, or their successors in interest, according to their respective interests in the copartnership effects, the averments relating to said sale are not sufficient to show any fraud touching that matter. When stripped of verbiage the allegations of the complaint relating to the alleged fraudulent sale are to the effect that Vinson, at a certain time, "assigned and transferred his interest in the property of said copartnership" to defendant David, who well knew of plaintiff's interest therein, and who, as plaintiff is informed, claims to be the owner of the entire partnership property by purchase from Vinson; that defendant David, without knowledge or consent of plaintiff, has taken possession of said property, and refuses to recognize plaintiff's exclusive interest therein, and threatens to deprive plaintiff thereof. The further allegations found in paragraph 3 of the complaint, to the effect that defendants have also taken possession of the books, stock, and all the effects of said copartnership, and ever since prevented plaintiff from access to the same, and from participating in the business of said firm, have no bearing upon the question of the fraudulent sale, as showing grounds for its vacation. Besides, the jury found that such allegations as to the taking of the books, etc., and refusing plaintiff access thereto, were not true. Moreover, the allegation that "defendants" had taken the books includes one copartner, who could rightfully be in possession of the books and papers of said firm, but could not rightfully deprive other members of access thereto. Those allegations, however, do not relate to the matter of fraudulent sale, which is the subject of special inquiry on this appeal. The allegation that defendant Vinson "assigned and transferred his interest in said copartnership property" to defendant David without consent of plaintiff, the vendee David knowing that plaintiff had an interest therein, is not ground for avoidance of the sale of Vinson's interest. A copartner may sell his interest in a firm to any purchaser found willing to buy, or his interest may be sold under execution, without assent of the other members of the firm; and that alone amounts to no fraud on the other members, unless some pro-

vision of the partnership agreement is violated thereby, although the sale of a member's interest to a stranger is held ground for dissolution and winding up of the affairs of the firm, because the other members are not bound to continue in copartnership with a stranger, with whom they have not chosen to engage in such relation. (Parsons on Partnership, §§ 9, 106.) All the further allegations relating to the charge of fraudulent sale are comprised in paragraph 4 of the complaint, which avers that said sale—that is, the sale of Vinson's interest in the copartnership, was made for the purpose of defeating and defrauding plaintiff, in that said copartnership is indebted to plaintiff, for money by him advanced to the firm, in the sum of $300 over and above his share of the capital, and also because said firm is indebted to other parties in a large sum, for which plaintiff is individually liable, all of which was well known to defendant David at the time of said sale and transfer.

Giving these averments all reasonable force and effect, or even going beyond the rule, and giving them the strongest interpretation admissible in favor of plaintiff's case, and they fail to disclose sufficient ground to warrant the cancellation of the sale alleged; for, granting that the firm was indebted to plaintiff and others as alleged, that fact did not forbid a sale by Vinson of his interest in the firm, as alleged, if he could find any one willing to buy it. Nor did that fact relieve Vinson from liability to plaintiff for overdrafts out of the firm assets. Nor did it relieve Vinson from his liability, along with plaintiff, for the debts of the firm contracted prior to the sale of Vinson's interest. Nor did such sale relieve the firm or defendant Vinson of their liabilities to plaintiff for his advancements in an accounting. This sale of Vinson's interest may have put his affairs in better condition to meet such liabilities; and if defendant David, having bought Vinson's interest, undertook to assume the whole property of the firm as his own, and exclude plaintiff from his rights therein, as alleged, while such conduct was ground for dissolution, accounting, and winding up of the affairs of the copartnership, in the proper action, and by interposition of a receiver, it was not ground for the cancellation of the sale of Vinson's inter-

est to David. When the affairs of the firm were thus wound up, David would, if he showed title to Vinson's interest, be entitled to Vinson's share of the residue, if any was found to belong to him on the accounting. Such is the showing of the complaint on the subject of the alleged fraudulent sale; and, while no question is raised touching its sufficiency in that regard, we must consider what its allegations are, in order to understand on what alleged facts it is proposed to cancel said sale, and to ascertain from the pleadings the issue on that subject.

Defendants made separate answers. The answer of Vinson, after denying each allegation of the complaint, for further defense, by way of new matter, alleges that by the terms of a verbal agreement, whereby said copartnership was formed, Vinson was made the sole and exclusive agent and manager of its business, with power to buy, sell, and otherwise handle and manage the property and business thereof, and also empowered to contract debts on behalf of the firm, and secure the same, if necessary, by execution of a mortgage on the firm property, or to sell the property of the firm to satisfy such debts; that, at the time of the formation of said copartnership, defendant Vinson was the owner and in possession of certain real and personal property, consisting of horses, cattle, sheep, and other personal property, together with certain corrals, fences, houses, and other improvements upon lands owned by said defendant, of the value of $4,000, as agreed by and between plaintiff and defendant Vinson in said copartnership agreement; that, according to the terms of said copartnership agreement, the whole of said property was, by Vinson, transferred to said copartnership firm, as capital stock thereof, in consideration of which transfer plaintiff agreed to pay defendant Vinson for the one-half interest in said property and in the copartnership business the sum of $2,000; that although payment thereof had been often requested, plaintiff has failed and refused to pay the same, except the sum of $209.50 paid thereon by plaintiff; that in said copartnership agreement it was agreed between plaintiff and defendant, as members of said firm, that for his services as manager of the copartnership business, to be carried on as aforesaid, defendant Vinson was to receive from the

firm the sum of $40 per month; that there is due and owing from said firm to defendant Vinson, by reason of such services, under the provisions of the contract, $1,160, which sum has not been paid, except as hereinafter stated; that, by reason of plaintiff's failure and refusal to pay his share of the expenses of said copartnership business, the firm became heavily indebted to divers parties, to wit, in the sum of $6,471, exclusive of the amount due defendant Vinson for services aforesaid; that prior to the 25th of October, 1892, and prior to the sale of certain copartnership effects mentioned below, defendant Vinson notified plaintiff of the condition of the business of said firm, and demanded of him a settlement, and further notified plaintiff of the mortgage existing on the sheep belonging to said firm to secure indebtedness to the amount of $4,500, and notified plaintiff that, unless he paid the amounts due from him to said copartnership, it would be necessary to sell part or all of the property and effects of the firm for the purpose of liquidating its indebtedness, all of which plaintiff well knew; that plaintiff failed and neglected to comply with said requests of Vinson, and Vinson, for the purpose of paying the indebtedness of said firm, and for no other purpose, sold to defendant C. C. David 1,920 head of stock sheep, 4 head of horses, 8 head of cattle, and certain other personal property of said copartnership, for the sum of $2,714, "subject to the terms and conditions of a certain mortgage of $4,500 against the said sheep, making the aggregate purchase price of said property $7,214; that the price received for said property was its full, fair, and just value"; that said sum of $2,714 so received by defendant Vinson for the sale and transfer of said property, and the whole thereof, was paid out by defendant Vinson in payment of the partnership indebtedness, except the sum of $843, which defendant retained as part payment of the amount due him from plaintiff, and the further sum of $82, still in the bank to the credit of the firm, which was reserved to pay certain indebtedness of the firm to W. W. De Witt, amounting to the sum of $76 and interest, which this defendant was restrained from paying by the injunction issued in this action; that there is still due from plaintiff to this defendant on account of the purchase price of one-half

interest in the business, and on account of wages due him as manager thereof, the sum of about $1,000.

The answer of defendant David specifically denies the allegations of the complaint relating to him, and to the alleged fraudulent purchase of said property, or an interest therein, by him, and further denies that he is insolvent, or unable to respond in damages to any extent which might be awarded to plaintiff for his interest in said property, and alleges that he (David) is the owner of real and personal property of the value of $20,000, subject to execution, but does not deny that he knew the property sold to him was copartnership effects, or that plaintiff had an interest therein as a member of said firm, or that the sale was made without plaintiff's consent, and for further defense alleges, substantially, the same facts regarding the sale and delivery of certain described property of said firm to him by Vinson, subject to mortgage, and the payment of the consideration, as set forth in the answer of Vinson, and that said sale and purchase was made in good faith, and the consideration paid therefor was a full and fair valuation of the property in question, and denies that he (defendant David) claims ownership of, or has ever taken possession of or assumed any control over, any property of said firm, except that bought by him as aforesaid; that, aside from that transaction, he has had nothing to do with, nor is concerned in, said copartnership firm.

Plaintiff, by replication, put in issue the new matter alleged in said answers, except that he does not deny the allegation of the answers that the sale to David was of certain property of the firm outright, and not of Vinson's interest therein, only, as alleged in the complaint. But plaintiff denies that David paid therefor the sum stated in the answers, or the full, fair, or just valuation thereof. The replication also admits that defendant Vinson is entitled to the sum of $960 for services rendered said firm under the provisions of the partnership agreement.

It therefore appears that two issues were raised as to the alleged fraudulent sale. One issue raised by the allegation of the complaint and answer was as to an alleged fraudulent sale of Vinson's interest in said firm, which allegation of fraud

was predicated on the fact that plaintiff Waite had an interest in said firm property, and had made advancements thereto over and above his share of the capital, and was also liable for the firm debts, all of which was known to defendant David when he bought Vinson's interest, which facts constitute no fraud, because, notwithstanding those facts, Vinson, as a copartner, had a right to sell his interest in the firm, unless conditions of the copartnership compact forbade such sale for a stated period, and no such conditions are alleged. Nor did such purchase exceed the right of defendant David to buy if he saw fit. The answer denies those allegations of the complaint, and thus raises an immaterial issue touching said sale, so far as any issue is raised between the complaint and answer. The other issue, as to the alleged fraudulent sale, and the only material issue in that respect, is raised by the new matter alleged in the answer, to the effect that, by said sale to David, certain described property of the firm was sold outright, in good faith, for the full value thereof, paid and assumed by David, which averments as to the alleged good faith of said sale, fair price, and payment were denied by the replication. This appears to have been the issue tried.

Therefore, it is apparent, and should be observed, that while defendant David may have been a proper party to the action for dissolution and accounting, as successor to Vinson's interest in the firm, by purchase, that allegation presented no ground for cancellation of the sale of Vinson's interest, and does not appear to have been relied on after defendant David answered, disclaiming ownership of any interest in the firm, but claiming to have purchased certain property thereof outright. But by the real issue relating to David, raised by the new and affirmative averments of the answer and denials of the replication, it really became an action involving two distinct causes, which could not be properly joined; that is, an action between partners for dissolution, etc., and also joining therewith an action against a stranger to the firm, to set aside a sale of firm property made to him on grounds of alleged fraud. But no question is raised as to this peculiar aspect of the case, and therefore the same is only noticed here to avoid the implication that such practice as appears in this case was sanctioned as proper.

The main assignment, and the one under which all the questions presented by this appeal may be considered, is that the evidence is insufficient to justify the finding that such sale was fraudulent, and the decision that the same be declared void.

At the trial plaintiff fell as far short of producing proof tending to show a fraudulent purpose on the part of either party to said sale as he did of alleging facts to that end in the complaint. The evidence introduced by both parties, with scarcely any contradiction on material points, shows the state of facts alleged in Vinson's answer regarding the condition of the firm in general when said sale was made, and the facts relating thereto.

It appears from the evidence that plaintiff resided in the state of New York, while defendant Vinson was in sole charge and management of said copartnership business in Montana, except in so far as he was occasionally advised in relation thereto by plaintiff's agent, Walter A. Waite; that the firm was indebted substantially as alleged in Vinson's answer; that plaintiff was in default somewhat in relation to said firm, but that question pertains to an accounting between the members, a question with which we have nothing to do in this appeal.

The sheep belonging to the firm were mortgaged, as alleged in Vinson's answer, as to which mortgage, and debt secured thereby, and several renewals thereof, plaintiff appears to have had full knowledge, and there appears to have been no question raised as to its good faith and validity, so far as shown by the record; and, besides that mortgage debt, the firm was indebted to divers parties, aggregating about $2,000, as alleged by Vinson, over and above the amount due Vinson from the firm. Prior to the sale in controversy, it appears that there had been interviews between Vinson and plaintiff's agent, Walter A. Waite, and with plaintiff himself, who appears on one occasion to have been in Montana, wherein the state of business of said firm was discussed, and an adjustment between the parties, and payment of the amount claimed to be due from plaintiff to the firm and to Vinson, was requested by the latter. The books and papers relating to the firm's affairs were available for examination by plaintiff and his agent, and it appears from the testimony of Walter A. Waite that he examined said

books, to some extent, at least. In those interviews the parties also discussed the matter of the sale and purchase of Waite's interest, for which it appears he asked $5,000, but Vinson declined to pay so much therefor. It appears, also, that defendant Vinson notified plaintiff that unless a settlement of his indebtedness to the firm was immediately made, and something done to raise money to pay the indebtedness of the firm, a considerable portion of the property thereof must be sold to raise funds to pay the outstanding indebtedness thereof, and that unless such settlement and provision for payment of the debts were made, defendant Vinson would proceed to sell a portion of the firm property to raise money to satisfy its indebtedness. But no such adjustment, settlement, and provision for payment of the firm debts were made by the partners, acting together.

Under these conditions defendant Vinson, on the 25th of October, 1892, sold to defendant David certain effects of the firm, described in a bill of sale thereof, for the consideration of $2,714, paid by David therefor, subject, by express terms of the bill of sale, to the chattel mortgage thereon to secure the sum of $4,500. The jury found that such payment of $2,714 was made by David, and this finding is fully in accord with the evidence; and there is no evidence in the record to support the modification of that finding by the court, to the effect that defendant David placed in the bank, to the credit of W. E. Vinson & Co., $2,000, "but as to what amount of that money was used by Vinson in paying the debts of the firm, and as to what amount was paid back to C. C. David, is a question the court will refer to a referee to decide, with other questions involving an account between the parties." Such modification is wholly without support, because there was no evidence introduced to justify such intimation, and this record purports to contain all the evidence introduced. Fraud must be proved, and not presumed. According to the evidence disclosed by this record, David paid over to Vinson, in purchase of the property sold, said sum of $2,714, and Vinson used about $2,000 thereof in payment of the debts of the firm, as shown by a schedule of the debts paid, proved and introduced in evidence; and Vinson retained the residue of said purchase money

to apply on the indebtedness claimed to be due him from said firm. And according to the express terms of the bill of sale introduced in evidence, executed between Vinson & Co., by W. E. Vinson on one part, and C. C. David on the other, as evidence of said sale and transfer, it was provided that the property sold and therein described passed to David, subject to said mortgage of $4,500 on said stock sheep. Hence, David was obliged to relieve the mortgaged property of that encumbrance, or lose his investment therein. The consideration paid for said property, subject to the mortgage, is shown by the evidence to have been its full market value at the time of said sale, and greatly exceeding its value at the time of the trial, because, soon after the sale, there was an extraordinary decline in the value of sheep. In view of the conditions shown in evidence, said sale was expedient and highly beneficial to the interests of the firm, from every consideration, had it been allowed by plaintiff to stand. Nor is there any fact shown in relation to said sale which tends to support the allegation of fraudulent purpose on the part of either defendant in relation thereto. Nor is any fact shown from which, by a justifiable implication, it can be presumed that either defendant thereby sought or intended to defraud the plaintiff or said firm. The price paid, and the use of the funds in discharging the debts of the firm, and the conduct of the purchaser in offering to rescind the sale on return of the price paid, as shown by the evidence, and not disputed, except by unsupported averment of the replication, all tend to contradict the allegation of fraudulent purpose on the part of defendants in said sale and purchase.

The only question of importance affecting said sale to David is whether such a sale of a large portion of the firm property by one member, without the concurrence of the other member—of which fact the vendee was cognizant—may be avoided, on complaint of the nonconcurring member, as for constructive or implied fraud in law. This question may, by liberal interpretation, be said to have been raised by the pleadings. The complaint alleges that when defendant David bought, he knew of plaintiff's interest in said property as a member of said firm, and that the sale was without plaintiff's

consent. It is true the complaint might justly be put out of consideration, as entirely insufficient, for it avers a sale of Vinson's interest in the firm, without plaintiff's consent, which averment, as we have seen, is insufficient to avoid such sale. But looking at the complaint along with the other pleadings, with somewhat liberal construction, as no point is made as to the insufficiency of any of them—viewed also in the light of the evidence introduced—it seems proper to regard the showing as an affirmance and admission that, when defendant David purchased said property of the firm he knew plaintiff was a member interested therein, and was aware that plaintiff did not concur in the sale. We have given much attention to this point, and find that the authorities, if cases were viewed separately, might be said to exhibit considerable conflict of opinion. It is held in certain cases—and very justly, we think—that such a sale was unwarranted, where there were no circumstances shown which necessitated the sale for the protection or advantage of the firm, and ought to be set aside, or the purchaser held to have only succeeded to the interest of the member making such sale, and be required to account to the nonconcurring member for his interest. (1 Bates on Partnership, §§ 401–05, and cases cited. This, of course, would be done equitably to the parties; and if the price paid was the fair value of the property, and the purchase money had been used to pay firm obligations, for which the complaining member was liable, or in part for that purpose, and in part been retained by a partner found on an accounting entitled thereto, there would hardly be any material injury to the complaining member through the sale. It certainly would not be equitable to hold that the purchase price might be retained, and go to the liquidation of firm debts for which the complaining partner was liable, and at the same time set aside the sale, and deprive the purchaser of the property bought, without any restoration of the purchase money, as was done in this case. On the other hand, there are authorities which affirm the right of a partner in management of the firm business to sell sufficient of the firm property, in bulk, to raise funds to pay its obligations. (Parsons on Partnership, 4th ed., §§ 108–10, and cases cited.) It is worthy of consideration whether this is not a just and

equitable holding, too; otherwise, the nonconcurring partner might, through sheer stubbornness, prevent an advantageous sale necessary to raise funds for payment of firm debts, and thereby subject the firm property to seizure, forced sale at diminished price, as well as having the proceeds further diminished by expense of such proceedings, thereby working great loss to the firm, and consequently to the members seeking to promote the interests of the firm through such sale. Mr. Parsons states his conclusion, from investigation of the subject and authorities, that such a sale, necessitated by the condition of the firm affairs, and in promotion of its best interests, if honest, and "without bad faith on the part of any party, we should say it was a valid transaction, which the law would enforce." (Parsons on Partnership, 4th ed., § 109.) No doubt, both lines of cases are founded on just principles, when applied to the circumstances involved, and in that view the decisions are harmonious; and it is observable that the cases, from the language used, seem to contemplate that under other circumstances the decision might be otherwise.

We return now to some further consideration of the facts shown in relation to the sale in question in the case at bar.

This is not an action by creditors to avoid the sale of property, on the ground that it was made with intent to defraud them of their rights. If it were, they would fail completely upon the facts shown in this case, because no fraud which would be sufficient to avoid said sale on the complaint of creditors has been shown. But this is an equitable action by one interested in the property, as joint owner, to rescind the sale because of alleged fraud perpetrated upon him through that transaction. In such a case the first inquiry which arises is whether he who seeks the equitable interference of the court has also done, or offered to do, equity in the premises. (*Maloy* v. *Berkin*, 11 Mont. 138.) That question arises here, and must be answered in the negative, against the plaintiff. As the case is disclosed by the record, this sale was made by one partner, for the full value of the property sold, as appeared when the sale was made; and for a price exceeding the real value of the property, according to the conditions unforeseen at that time; and a large part of the purchase price was used

in the liquidation of the debts of the firm, for which plaintiff was liable. But, through this action, he seeks the cancellation of said sale without any offer or provision whatever to restore to David the amount paid in the purchase of said property.

Even where property is bought under circumstances of oppression and fraud, which are entirely absent from this case, equity does not cancel the sale without provision for restoration of the price paid. (*Maloy* v. *Berkin*, 11 Mont. 138, and cases cited.) But had such offer been made, or had defendant David's proposition to that effect been accepted, it would not have been necessary to go to court to obtain a cancellation of said sale; for it appears, without dispute, from the evidence, that after the sale was made several interviews were had between plaintiff, represented by his attorney and agent, and David and Vinson, in respect to said sale, wherein it appears defendant repeatedly offered to rescind the sale, and deliver the property back, if the firm would restore to him the money he had paid in said purchase, and the expense he had been to in caring for the sheep after delivery to him. And, moreover, on one occasion, defendant David went further, and offered to plaintiff, through his agent and attorney, a complete rescission of said sale, and restoration of the property to the firm, on the repayment to him of the money which he had paid to the firm in said purchase, and he (David) would suffer the loss of such expense, amounting to about $400. And furthermore, there being a dispute between Waite and Vinson as to the portion of said purchase money retained by Vinson to apply on his claim against said firm, David offered to allow the sale to be rescinded on payment to him of the purchase price, which had been used directly for plaintiff's benefit, in payment of the debts of the firm, to the amount of about $2,000, outside of Vinson's claim; and David offered to depend upon Vinson, individually, to restore that portion of the purchase price which he had retained to apply on his claims against the firm. This offer eliminated, as far as defendant David was able, all disputed conditions upon which plaintiff Waite could rightfully refuse to concede to the equitable condition on which David offered a rescission of said sale. But it appears plaintiff and his counsel entirely ignored those propositions, and

proceeded in this action to take said property away from David, through the receiver, in the attempt to cancel said sale, and recover the property sold, at the same time retaining the benefit of the purchase price paid by David, which went to the payment of obligations for which plaintiff was not only liable as a member of said firm, but, if its assets were insufficient to liquidate its liabilities, he was liable therefor wholly and individually, as between himself and the creditors of the firm. After the property was taken from David, as we are informed by counsel, it was not retained for the firm by payment of the encumbrance thereon, but the mortgage was foreclosed by the mortgagee. Thus, as a result of this unwarranted attack on said sale, the mortgaged property was taken away from David without the slightest benefit to the firm, but injury to all concerned.

The case, so far as it relates to said sale, and to defendant David, exhibits an abuse of the processes of the court. The facts shown were insufficient to warrant the cancellation of said sale to David, but warranted the contrary decision, which should have been made on the evidence produced.

The judgment declaring void said sale to defendant David should therefore be reversed, and the case is remanded, with direction to enter judgment in favor of defendant David, to the effect that no cause for cancellation of the sale of said partnership effects, described in said bill of sale to him, has been shown, and therefore that plaintiff take nothing by said action, so far as it relates to defendant David, and that said defendant have judgment against plaintiff for his costs expended therein; and it will be ordered accordingly.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur. DE WITT, J., concurs in the reversal.

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THOMAS, APPELLANT, v. CHAMBERS ET AL., RESPONDENT.

[Submitted February 12, 1894. Decided May 14, 1894.]

JUDGMENT BY DEFAULT—*Motion to vacate—Sufficiency of grounds.*—Though a defendant may have a meritorious defense to an action the mere neglect of his counsel to file an answer in time, which neglect is neither explained or excused, is not a ground upon which a default judgment may be vacated under section 116 of the Code of Civil Procedure, providing that a party may be relieved from a judgment taken by mistake, inadvertence, surprise, or excusable neglect.

Appeal from Eighth Judicial District, Cascade County.

DEFENDANTS' motion to vacate the judgment was granted by BENTON, J. Reversed.

Ed L. Bishop, for Appellant.

Judgment will not be set aside without affidavit of excusable neglect or inadvertence and also of merits. (*Lamb* v. *Gaston etc. Co.*, 1 Mont. 64; 3 Estee's Pleadings, 362; *Bailey* v. *Taaffe*, 29 Cal. 424.) The only excuse respondents attempt to set up is the negligence of their attorney. Negligence of attorney or agent is uniformly treated as the negligence of the client or principal, except in New York and North Carolina. (Freeman on Judgments, § 112, and cases cited.) Act or omission of attorney is act or omission of client, and no negligence will be excusable in the former, which would not be in the latter. (1 Black on Judgments, 341, and cases cited.) Mistake or neglect of attorney is not ground for vacating a judgment unless the mistake or negligence would be excusable if attributable to the client. (12 Am. & Eng. Ency. of Law, 135, and cases cited.) A judgment will not be vacated because an attorney neglected to file the pleading in due time. (12 Am. & Eng. Ency. of Law, 135, and cases cited.)

Thomas E. Brady, for Respondents.

Whether any particular state of facts do or do not constitute the inadvertence or excusable neglect for which a party may obtain relief under any statute, is not determined by the statute itself, but is left entirely to the discretion of the trial

judge or court. (*Benedict* v. *Spendiff*, 9 Mont. 88.) This court has expressly refused to adopt the rule held by some of the California cases that the neglect of an attorney furnishes no ground for vacating a judgment rendered through such neglect. (*Briscoe* v. *McCaffery*, 8 Mont. 336.) And has reversed a trial court for refusing to set aside a judgment in a case where attorneys who had been employed failed to plead in time. (*Heardt* v. *McAllister*, 9 Mont. 405; *Cleveland* v. *Burnham*, 55 Wis. 598. See, also, *Whiteside* v. *Logan*, 7 Mont. 381; *Watson* v. *San Francisco etc. R. R. Co.*, 41 Cal. 20; *Jensen* v. *Barbour*, 12 Mont. 576.) Mrs. Chambers having intrusted her husband with attending to her defense, was properly relieved from the judgment. (*Nicholson* v. *Cox*, 83 N. C. 44; 35 Am. Rep. 556.)

Per CURIAM.—In the court below, the appellant recovered judgment by default against the respondents. The respondents had been personally served with summons, and employed counsel to defend the action. Within ten days from date of service of summons on the defendants, their counsel filed a demurrer to the complaint. The demurrer, upon a hearing, was by the court overruled, and the defendants given five days thereafter to answer the complaint. No answer having been filed within that time, judgment was regularly rendered, for want thereof, against the defendants. Thereafter the defendants filed their motion, supported by affidavit and accompanied by answer, to set aside said judgment. The court granted the motion. From this action of the court this appeal is prosecuted.

The affidavit of James Chambers in support of the motion to set aside the judgment is as follows: "James Chambers, being first duly sworn, says that he is one of the defendants in the above-entitled action, and that the codefendant is his wife; that the summons herein was served upon him and his wife on the thirteenth day of December, 1892; that within the period of time allowed by law for him to appear in and answer to the complaint herein, and within ten days from the time of said service, to wit, on the eighteenth day of December, 1892, he did employ one Peter M. Baum, a duly authorized

practitioner at the bar of Cascade county, to *render* appearance for him and his said wife, and to interpose their defense to this action; that, at the time of so engaging the said Peter M. Baum, deponent did pay him the retainer fee which was asked by the said Baum herein, and was advised by the said Peter M. Baum that he would, at the proper time, interpose his defense, and communicate with him as to when he would need his signature to any pleadings; whereupon, on or about the twenty-third day of December, 1892, as deponent is informed and believes, the said Peter M. Baum did, in behalf of defense, interpose a demurrer to plaintiff's complaint herein, which was on the —— day of January, 1893, passed upon by the court and overruled, and defendants, as appears by the record of the court proceedings herein, were granted five days within which to file answer to said complaint. Deponent alleges that he and his codefendant relied absolutely and entirely upon their said attorney, Peter M. Baum, to prepare the pleadings in the above case, and attend to all the preliminaries necessary in preparing said case for trial. Deponent alleges further that at no time previous to the nineteenth day of January, 1893, were he or his codefendant advised of the action of this court, and they had no communication nor advice from their said attorney as to the condition of their case until said last-mentioned date, when, accidentally, deponent was advised that said demurrer had been overruled, the time to file defendants' answer had expired, that the defendants were in default, and a judgment had been entered for the plaintiff against them, for the sum of —— dollars; that defendants did, upon learning said facts, employ counsel at once to make application to this court to open said default and set aside aforesaid judgment."

The affidavit also alleges that defendants have a meritorious defense to the action, and tenders an answer, which apparently contains a complete defense, if the facts alleged therein are true.

Our statute provides that the court may, upon such terms as may be just and the payment of costs, relieve a party or his legal representative from a judgment taken against him by mistake, inadvertence, surprise, or excusable neglect. (Code Civ. Proc., § 116.) The question for us to determine is, Have the respondents, by this affidavit, brought themselves within

the provisions of this statute? They show that they employed counsel to defend this action. Their counsel failed or neglected to prepare and have filed their answer within the time fixed by the court. No reason is given why he failed or neglected to do so. The failure or neglect to file answer is in no way sought to be excused. No excusable neglect is shown, or sought to be shown. If this judgment, upon this showing, can be set aside, then any judgment by default can be set aside for the simple asking. We see no such showing of excusable neglect as to authorize the court, in the exercise of judicial discretion, to set aside the judgment in this case.

The order of the court below setting aside the judgment is reversed.

Reversed.

All concur.

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STATE EX REL. BALDWIN, RESPONDENT, v. KELLOGG, APPELLANT.

[Submitted May 11, 1894. Decided June 4, 1894.]

PHYSICIANS AND SURGEONS—*Medical Examiners—Pleading.*—While a complaint in proceedings instituted before the state board of medical examiners to revoke a physician's license must set forth facts which constitute an offense pleadings must not be too strictly construed nor should too close observance of the science of pleading be required.

SAME—*Same—Revocation of license—Sufficiency of complaint.*—Revocation of a physician's license for unprofessional, dishonorable, and immoral conduct cannot be sustained upon a complaint which merely charged that on a given date the defendant placed in a furnace a headless fœtus, about seven months old, with intent to destroy the same and conceal its birth; and that at the coroner's inquest over such fœtus he testified that the child was the result of a miscarriage, its head having become detached in delivery; that he would not disclose the mother's name, as she had requested him not to make it known, and that he had been advised that he need not disclose it; that he withheld it, not through fear of incriminating himself, but to avoid the publicity it would give the mother, but that he would give her name to the coroner the next day, who could use his discretion in the matter, while upon the next day he refused to give her name upon the ground that she had left the state, and without her presence to explain her condition at the time his answer might incriminate him, since neither the attempt to burn the fœtus nor the refusal to disclose the mother's name was of necessity either unprofessional, dishonorable, or immoral, but both were acts as consistent with innocence as with guilt. (HARWOOD, J., dissenting.)

Appeal from First Judicial District Lewis and Clarke County.

SPECIAL proceeding instituted before the state board of medical examiners to revoke defendant's license to practice medicine and surgery. The board convicted defendant of unprofessional, dishonorable, and immoral conduct, and revoked his license. Defendant appealed to the district court. The cause was tried before BUCK and HUNT, JJ., sitting concurrently, who rendered a judgment revoking defendant's license. Reversed.

Statement of the case by the justice delivering the opinion:

The state board of medical examiners organized and have been acting under the provisions of what is called the "Medical Law," which was approved February 28, 1889 (16 Sess. Laws, p. 175.) The appellant is a practicing physician in the state of Montana. The proceedings which resulted in this appeal were originally instituted before the medical board for the purpose of revoking appellant's license as a physician and surgeon. The Medical Law, above quoted, provides that the board may revoke a physician's certificate for unprofessional, dishonorable, or immoral conduct. The complaint which was filed before the medical board against the appellant, Dr. Kellogg, charged him with such conduct, and gave specifications. The portion of the complaint which is material in this inquiry is as follows:

"BOARD OF MEDICAL EXAMINERS OF THE STATE OF MONTANA, PLAINTIFF, v. EDWIN S. KELLOGG, DEFENDANT.

"STATE OF MONTANA, } ss.
"County of Lewis and Clarke. }

"S. C. Baldwin, being first duly sworn, deposes and says that between the first day of March, 1893, and the thirty-first day of March, 1893, at the city of Helena, in the county of Lewis and Clarke, and state of Montana, one Edwin S. Kellogg, late of the county of Lewis and Clarke, in the state of Montana, being then and there a practicing physician and surgeon, and being then and there the holder of a certificate to practice medicine and surgery in the state of Montana, issued by the board of medical examiners of the state of Montana, was guilty of unprofessional, dishonorable, and immoral conduct in this, to wit:

"1. That upon the fourth day of March, 1893, said Kellogg placed in the furnace of that certain building in the city of Helena, said county and state, known as the 'Masonic Block,' situated at the corner of Broadway and Jackson streets, in the said city, in which block said Kellogg had an office as physician, a package covering and containing a headless fœtus, about seven months old, with intent to destroy the same, and to conceal its birth.

"2. That at the coroner's inquest held at the courthouse in the city of Helena by Dr. T. H. Pleasants, the coroner of the said county of Lewis and Clarke, over the said fœtus, the said Kellogg testified as a witness, after having been sworn, upon the eighth day of March, 1893, to testify to the truth, the whole truth, and nothing but the truth, substantially as follows: That he had been called in to attend a woman who shortly afterwards suffered a miscarriage. That she was delivered of a child, and that, while being delivered, the head of the infant became detached from the body; that he took the body of the infant to his office, wrapped it in a sheet of paper, and threw said body into the furnace of the Masonic Temple; that he had before thrown amputated members of the bodies of persons in said furnace. The party referred to as being the patient from whom the fœtus was taken asked not to have her name made known, if possible to avoid it, and that he had been advised that he need not answer it unless he chose to do so. He declined to answer, not because he is afraid of incriminating himself, but to avoid the publicity of the lady's name in the papers. The fœtus had been dead four or five days when taken away. The head was in part detached. The fœtus is three months and one week old. He is willing to disclose the name of the lady to-morrow, at 2 P. M., to the coroner, who will use his discretion in the matter. And that thereafter, upon the ninth day of March, 1893, said Kellogg testified, as such witness, still further: 'The person whose name you ask for has left the state of Montana, and is beyond and without the jurisdiction of any court of the state of Montana. Without the presence of that person to explain and certify to her condition at the time the fœtus was taken from her, my answer, under the

existing circumstances, would incriminate me, and be testimony against myself, and on that ground I refuse to answer.'"

The appellant duly appeared before the medical board to answer the charge and specifications contained in the complaint. Upon his appearance he filed a demurrer, the ground of which was that the complaint did not state facts which amounted to unprofessional, dishonorable, or immoral conduct. This demurrer was argued before the board, and was overruled. The board then proceeded to try the appellant upon the complaint. The result of the trial was that the appellant was found guilty, and it was adjudged that his license be revoked.

In pursuance of the provisions of the Medical Law the appellant appealed from the board to the district court. In that court he reargued, and insisted upon his demurrer. The demurrer was overruled by the district court. He was thereupon tried upon the complaint, and found guilty, and it was adjudged that his license be revoked. From that judgment appellant appeals to this court.

T. J. Walsh, for Appellant.

The complaint charges in substance that the defendant threw a headless fœtus, about seven months old, into the furnace of the building in which was his office, with intent to destroy the same and conceal its birth; that at a coroner's inquest held upon such body he testified that it was three months and a week old; that he did not desire to give the name of the mother, not from fear of incriminating himself, but to avoid publicity, and that he was willing to give the name to the coroner next day; that the next day he appeared and informed the coroner that the lady had left the state, and that in her absence and without her testimony concerning her condition, his answer would incriminate himself and be testimony against him, and that he therefore refused to give it; that thereupon defendant was committed for contempt; that he was released on *habeas corpus*, and never gave the name of the woman; that defendant failed to report the birth of the child in violation of section 2 of article V of chapter XIII of the ordinance of the city of Helena concerning notification of births within the said city. There is not a suggestion in the complaint that there was a

word of untruth in any thing that the defendant said. He said the fœtus was three months and a week old, when in fact it is alleged it was seven months, but there is no allegation that he falsely said so, or that he knew any better, or that it was not a mistake in judgment. The court held upon the *habeas corpus* proceedings that he had a perfect legal right to refuse to answer, and it is difficult to understand how his refusal to answer can be urged against him, that is, how his certificate can be annulled for doing what the law allowed him to do. For the constitutional privilege cannot be made to read, "No person shall be compelled to testify against himself, but if he claim this privilege his right to practice his profession shall be taken away from him." And yet this complaint must be sustained, if sustained at all, on the theory that claiming the privilege not to testify is a confession of crime. The law is otherwise. (Greenleaf on Evidence, 450; *State* v. *Bailey*, 54 Iowa, 414; *Carne* v. *Litchfield*, 2 Mich. 340; *State* v. *Mannansan*, 60 Mich. 15; *Phelin* v. *Kenderline*, 22 Pa. St. 354–63; *Rose* v. *Blakemore*, Ryan & M. 382; *Lloyd* v. *Passingham*, 16 Ves. 64; 2 Phillips on Evidence, 949, 950; Rapalje on Witnesses, 267.) The claim of violation of the city ordinance is not insisted on. But if it were the complaint does not aver that the birth occurrred within the city, nor that the child ever lived. The act was not intended to compel a record of miscarriages. But the offense defined is simply *mala prohibita*, and nothing is "unprofessional" unless it is either immoral or dishonorable. (*State* v. *Medical Board*, 32 Minn. 312.) The complaint further does not state whether the defendant's certificate was issued under the provisions of section 3, or section 4 of the Medical Act. If it was issued under section 3 the board had no jurisdiction to revoke it.

Attorney General Henri J. Haskell, C. B. Nolan, and Blake & Penwell, for Respondent.

Proceedings of this character are analogous to charges preferred against an attorney, and are not required to be formal or technical like an indictment. (*Randall* v. *Brigham*, 7 Wall. 539, 540; *In re Randall*, 11 Allen, 478, 479.) It is charged in the complaint that appellant placed in a furnace a package

covering and containing a headless fœtus about seven months old, with the intent to destroy the same and conceal its birth. It is charged that a judicial investigation concerning said fœtus was held by the coroner, and that appellant was sworn as a witness to testify to the truth, the whole truth, and nothing but the truth. It is charged that appellant declined to give the name of the mother of the fœtus, not because he was afraid of incriminating himself, but to avoid the publicity of her name in the papers, and that he was willing to disclose her name to the coroner upon the next day; and that upon the following day appellant testified that his answer in that matter "would incriminate him and be testimony against himself, and on that ground I refuse to answer." It is charged that proceedings were had to compel appellant to answer the question respecting the name of the mother of the fœtus, that the court ordered the discharge of the appellant from custody, and that appellant never gave the name of this party. Respondent maintains that it was the duty of appellant to assist the officers of the government who were trying to determine whether a crime of a heinous nature had been committed. This obligation to society rests upon all good citizens regardless of professional ethics. Appellant interfered with the administration of justice and did not testify to the whole truth before the coroner's jury. Appellant was guilty of bad faith and did not keep his promise to give the coroner the name of the mother of the fœtus. Appellant was guilty of duplicity, if not perjury, in assigning one reason for his refusal to testify on one day and stating a different reason therefor upon the next day. Appellant contends in his brief that he "had a perfect legal right to refuse to answer." That is not the charge. How long would this court permit an attorney to practice his profession if he refused to give an answer to a question in a judicial inquiry upon the ground that his answer would prove him guilty of a felony? Why was appellant destroying a headless fœtus and concealing its birth from the officers of the law? The effect of the conduct of appellant is evident; the charges are plain, and appellant offered no explanation of his acts upon the trial, and does not attack the judgment upon the ground that it is contrary to the evidence. Professor Ogston in his lectures on medical

jurisprudence says: "When called into court to give evidence the witness is first sworn to tell the truth, the whole truth, and nothing but the truth, words admirably calculated to impress him with the solemnity of the occasion, as well as to prevent concealment on his part." (Page 18.) "In adducing his testimony the medical witness is not at liberty to withhold any information which may bear on the case, in whatever way it has been acquired. On this principle it has been held that a practitioner is even bound to disclose the secrets divulged to him in the course of his professional attendance, however much it is to be lamented that such disclosures should be made the subjects of judicial publication." (Page 21.) These are the views of one of the most eminent physicians, and the rule should be applied to appellant.

DE WITT, J. This case comes to us entitled "*The Board of Medical Examiners of the State of Montana* v. *Edwin S. Kellogg.*" It should probably bear the title as written at the head of this report.

The trial and argument of this case have taken a wide scope, but upon the threshold of the inquiry we meet, perhaps, the most important question involved. The complaint before the medical board was the original pleading in the proceeding, corresponding to the complaint or declaration in a civil case, or indictment or information in a criminal case. The medical board is a special tribunal, created by the medical law, and having jurisdiction over a limited subject matter. (16 Sess. Laws, p. 175.) The tribunal is composed of physicians, and not of any persons who are required to be learned in the law. We are of opinion that, before such a tribunal, pleadings should not be too strictly construed, nor should a too close observance of the science of pleading be required. But it cannot for one moment be doubted that the complaint must set forth facts which constitute an offense. A defendant in such a proceeding is to answer a charge of unprofessional, dishonorable, and immoral conduct. If the judgment is against him he is deprived of the right to practice his profession, to which perhaps he has devoted a life of learning and labor. In a situation of this gravity a defendant has the right, within the spirit

of the constitution, "to demand the nature and cause of the accusation" (Const., art. 3, § 16); that is to say, a defendant must be notified of what he is charged, and he must be charged with something. The complaint must set out facts which constitute unprofessional, dishonorable, or immoral conduct. This defendant has constantly insisted that the complaint in this proceeding does not set out such facts, and he so urges in this court. To that inquiry we will first address ourselves. We will examine, *seriatim*, what is said in the complaint. Taking up the first paragraph, and holding up to inspection the facts stated, we observe, first, that the defendant, a physician, threw into a furnace, with intent to destroy it, a human fœtus, seven months old. Was this unprofessional conduct? This court is in possession of a few elementary physical facts. Among them is the fact that the mothers of the human race, living under the conditions of higher civilization, do not always, or indeed often, bear children without aid and attentions from persons skilled in matters obstetrical. We also know that premature deliveries and accidents, commonly called "miscarriages," occur. At such times physicians are called to render services. In the course of such services the physician must become possessed of fœtuses. It is professional that he should. It is not immoral or dishonorable that he should. No argument to this effect can say more than the simple statement. It is a postulate to which every intelligence assents. Nor can it be contended that the simple fact of destroying such a thing is unprofessional, immoral, or dishonorable. In fact it must be destroyed. Sanitary rules demand its destruction; and incineration is certainly as proper as inhumation, or any other method of destruction. No reason is discoverable why the physician may not properly destroy such waste human substance, as that he may destroy the amputated leg or arm of another of his patients.

But the weight, if any there be, of this specification of the complaint, is that the defendant destroyed this fœtus with the intent to conceal its birth. If defendant were charged with criminal abortion, the concealment of the product of the abortion might be presented as evidence tending to prove his guilt. But the fact must not be lost sight of that in this case the com-

plaint does not pretend to charge Dr. Kellogg with committing an abortion. Therefore the only charge of this paragraph of the complaint is that he intended to conceal a premature delivery of a human fœtus. There are such deliveries which are accidental, unintentional, and wanting in all criminal procurement, intent, or act, either by the mother, the physician, or any one, and due only to casualty or the weakness of nature. For aught that appears in this complaint the fœtus described came from just such an accident. The court cannot presume, in the absence of a charge, that the fœtus came from a criminal act, instead of an innocent one. Therefore, assuming that this fœtus was produced by no criminal act (and it must be so assumed when no criminal act is charged), and assuming that defendant was lawfully in possession of it (and the contrary is not charged), then was it immoral, dishonorable, or unprofessional to conceal its birth? The inquiry reduces itself to this simple proposition: Is it immoral, dishonorable, or unprofessional for a physician to conceal the fact that one of his patients has innocently suffered the accident of a fœtal miscarriage? For nothing more than this is specified in the complaint. It is not specified that the defendant intended to conceal the fact of a criminal miscarriage or abortion. We unhesitatingly say that it is not immoral, dishonorable, or unprofessional for a physician to conceal the fact of such an innocent accident. It is but stating the common knowledge of all persons living in and observing modern social life to say that it is natural and proper that a woman who suffers such an accident desires that it be not proclaimed to the community. As long as it is an accident, neither morals, public policy, nor law require that it should be so heralded. Both the patient and physician are right in concealing it. Such accident may be the disappointment and misfortune of the family, anxious for offspring; or it may be the imprudence, shame, and disgrace of her who has no social right to be in a condition where such an accident could happen. In either case, in the absence of any criminal or immoral act or intent by any one in procuring the premature birth, the concealment is not immoral, dishonorable, and unprofessional. Publicity would work no good. Concealment works no harm. Publicity might bring needless

suffering, mortification, and distress, where no crime or immorality had been committed in the miscarriage.

What is said in this opinion is possibly liable to misunderstanding, unless it be clearly kept in mind that we are treating only the charge and specifications of the complaint, and are not going beyond that pleading. At the risk of prolixity and reiteration we must add emphasis to our declaration that in this complaint no abortion and no criminal act are charged in reference to the production of this fœtus. Let it be clear that we say nothing condoning sexual immorality, or tolerating the act of a physician who criminally interrupts the course of nature in the production of the species. We are not pronouncing upon whether Dr. Kellogg was guilty of immoral, dishonorable, or unprofessional conduct; but we do say that the complaint, by the natural and necessary construction, does not specify it. We do say that this first paragraph of the complaint could be specified against a wholly innocent physician; and we do say that no professional ethics or morality or honor can require a physician to herald to a community the accidents or misfortunes of his patients, when no criminal or immoral acts are connected with such accidents or misfortunes, and no law or public policy requires their revelation. It is true that counsel for the medical board contend that public policy demanded that Dr. Kellogg reveal to the coroner the name of the mother of the fœtus. But that branch of the complaint will be discussed later. We are now treating only the allegation of the intent to conceal the birth, and holding that such concealment was not, in itself, in the absence of the specification of any criminal act or intent, either immoral, unprofessional, or dishonorable.

We advance to the second specification of the complaint. It recites the holding of a coroner's inquest over the acephalous fœtus described in the first paragraph of the complaint. At that inquest the defendant was a witness on the eighth day of March, 1893. He testified that he had been called to attend a woman who had suffered a miscarriage, and that the fœtus resulting therefrom was the one which he had thrown into the furnace. What he testified to before the coroner appears fully in the complaint, which is recited in the statement of this case

preceding this opinion. It is the story of an ordinary accidental miscarriage. If what he testified was true as to the birth of the fœtus there is nothing which squints at immoral, dishonorable, or unprofessional conduct. And let it be marked that the complaint does not say that one word which Dr. Kellogg uttered before the coroner's inquest was false. It does not charge that he testified for the purpose of concealing a crime or impeding the administration of law. It is not charged that he suppressed the truth, or any part thereof, or spoke that which was false in any part thereof. He testified that the fœtus was three months and a week old, but, for all that appears, this was his professional opinion. He refused to give, at the inquest, the name of the mother, for the reason that she had requested him not to make it public if it could be avoided, and he had been advised that he was not required to do so, but that he would give the name to the coroner the next day, who could use his discretion. All this is set up in the complaint; that is, the complaint specifies that Dr. Kellogg testified, as just recited, at the coroner's inquest. No immoral, unprofessional, or dishonorable conduct can possibly be construed from this testimony of Dr. Kellogg before the coroner. If the miscarriage which he attended was innocently accidental (which it was, as far as it appears in the specification), it was not immoral, unprofessional, or dishonorable for him to decline to give the name of the woman, unless positively required to do so. Indeed, there is a very prevalent belief that it would be unprofessional and dishonorable for a physician to disclose the name and ailments of his patients without their consent, or unless he were required so to do. Dr. Kellogg refused to give this name at a public inquiry, for the reason that his patient had requested him not to, and he believed he was not required to. The question is not whether Dr. Kellogg disobeyed or disregarded the rules of evidence in judicial inquiries; but the question is whether it was immoral, unprofessional, or dishonorable conduct for him to refuse to testify when he believed that honor required him not to, and he was advised that the rules of evidence did not require him to testify. Of course he could be compelled to answer this question if it were a legal and pertinent inquiry at a judicial investigation, and the legal-

ity and pertinancy of the inquiry would be determined by the proper tribunal. We are not discussing that matter. It is not before us. The matter before us is, Was Dr. Kellogg's attitude and testimony before the coroner's inquest, on March 8th, immoral, dishonorable, or unprofessional? To the question we answer, "No." He offered to disclose the name of the woman to the coroner (privately, it would seem), that the coroner might use his discretion. This portion of the complaint comes down to this proposition: It was not immoral, dishonorable, or unprofessional conduct for Dr. Kellogg to refuse to reveal the innocent, noncriminal secrets of his patient (for they are not specified to be other than noncriminal and innocent), when he was requested not to, and was advised that he was not required to. Whether this advice to him was sound, and whether he could be required to testify, is not here the inquiry.

So far in the complaint, we say, without hesitation, that there is nothing to engage the serious attention of a tribunal assembled to try Dr. Kellogg for immoral, dishonorable, and unprofessional conduct. But we now come to the portion of the pleading which, taken with what precedes it, has occupied our most careful and deliberate thought. It has already had the investigation of the eminent tribunal of physicians who constitute the medical board, and the judicial inquiry of an able court of general jurisdiction. Our own study has impressed us with the importance of the final decision of this case. It is the first decision of this court upon the nature and sufficiency of a charge and specifications to put a doctor of medicine upon his defense for immoral, dishonorable, or unprofessional conduct. While we extend all approval to legislation intended to exclude immoral and dishonorable conduct from an honorable profession, yet the spirit of our American law is such that we must hold that a doctor, to be tried for professional misfeasances, is as much entitled to a clear charge and specification against him as has a burglar or murderer the right to a definite, specific indictment.

But as to the *gravamen* of the specification against defendant. The complaint goes on to say that on March 9th, the day following the giving of Kellogg's testimony, heretofore

discussed, he further testified at the inquest that the woman whose name was demanded had left the state, and was beyond the jurisdiction of any court of Montana, and, without her presence to explain her condition at the time the fœtus was taken from her, his answer, under the circumstances, would incriminate him, and be testimony against him, and for that reason he refused to answer. Such is the specification of the complaint following the other facts set up in that pleading. Was this immoral, dishonorable, or unprofessional conduct? As before noted it is nowhere charged that Dr. Kellogg had committed an abortion. It is now to be observed that it is not charged that Kellogg procured the woman to leave the state for any improper purpose, or at all, or that he even knew of her intention to leave. It is not charged that what Kellogg testified on March 9th was false. It is not charged that Kellogg testified as he did on March 9th for the purpose of impeding the administration of justice, or hampering a judicial inquiry. It is not charged that his conduct had such result or tended thereto. Such charges are abundant in the argument of counsel, but in the complaint they are conspicuous by their absence.

So this portion of the complaint, like the other portions examined, reduces itself to a simple proposition. The prosecution contend that Kellogg admitted that there existed facts in his professional relations which were criminal, and that, therefore, he admitted that he was guilty of crime in his professional conduct, and that such conduct would of course be immoral, dishonorable, and unprofessional conduct. If this position is sound, and the complaint sustains it, there is a cause of action set out which would sustain a judgment of revocation of defendant's license. It is appropriate here to inquire what crime Kellogg admitted, if any. None being anywhere specified, the student of the complaint must grope for the crime, the admission of which it is claimed the defendant made. The defendant contends that a refusal by a doctor to testify, on the ground that his testimony would incriminate him, cannot be used against him on a trial for immoral, dishonorable, or unprofessional conduct. He cites decisions of cases in criminal prosecutions. Without applying that doc-

trine, or deciding whether it is applicable, we will regard the case from another point of view. The question is, Was Kellogg's refusal to testify immoral, dishonorable, or unprofessional conduct? And the question is not whether it was evidence tending to prove that he was guilty of such conduct. If Kellogg had been charged with criminal abortion, or any other crime (which he was not), then his refusal to testify at the inquest might, if it were admissible as evidence against him, tend to prove his guilt. But, at the very most, the refusal to testify, in the point of view from which we are now considering it, was not an offense in itself, but was simply sought to be held up as evidence tending to prove an offense, and an offense which was not named in the complaint, but left to conjecture. This is a *quasi* criminal action. A defendant is entitled to a more certain charge.

On March 8th Kellogg said he would give the name of the woman to the coroner. On March 9th he refused to do so. But circumstances had, without Kellogg's procurement, changed in the *interim*. The woman had left the jurisdiction. Then Kellogg expresses his opinion that, without her presence to state the truth, for him to give her name would criminate him. How it would criminate him we do not perceive. But he thought it would. This was his own opinion. He was not advised upon this point, as he was upon the matter of his testifying the day before. When he said that to give the woman's name would criminate him it is fair to consider that there was in view what was likely to follow giving the name; that is, an inquiry into the facts of her miscarriage. Now, Kellogg believed that, in her absence, such inquiry would tend to criminate him. His position in this was consistent with ordinary human nature, as we see its operations. It was consistent with innocence. If one be placed under suspicious circumstances, and he is suddenly and unexpectedly deprived of the material testimony which would prove his innocence, as he believes, it is perfectly natural that he should think that inquiry into the circumstances would tend to criminate him. This is all that appears against Kellogg in the complaint. His conduct, to be sure, can be explained upon the hypothesis of guilt. It is entirely consistent with the fact of his having committed

a criminal abortion, and attempting to conceal the same. If he were guilty of such a crime he might have naturally pursued just the course which is specified in the complaint.

But, on the other hand, that which must demand our attention is that a wholly innocent man could have acted just as Kellogg did. Whether an innocent man would have so acted is not the inquiry. He could have, and he might have, so conducted himself; that is to say, the specifications of the complaint do not at all clearly exclude the supposition of the innocence of the defendant. They do not show that defendant could not be innocent, and the complaint be true. The complaint hints at guilt, but leaves open the hypothesis of innocence. If the complaint be true the defendant may be guilty, and he may be innocent. Pleading of such a nature would not do in a civil case. It surely must not be allowed in a *quasi* criminal case. Concede that the facts set up in the complaint raise a grave suspicion of the commission of an abortion by the defendant. Must he prepare for trial upon a suspicion? To be sure, a member of an honorable profession, as that of medicine, should raise his conduct above suspicion. But if circumstances arise which may, under one construction, cast a suspicion upon a physician and if the circumstances are susceptible also of a construction consistent with his innocence then, if the construction of guilt is to be adopted, the guilt should be charged, and not left to inference. The plain fact is that the complaint in this case is curious. It seems as if the pleader hesitated at making a specification of immoral, dishonorable, or unprofessional conduct, and contented himself by narrating circumstances of suspicion, with the intention of seeing what the defendant might say. It was a process of throwing suspicion upon the defendant, and leaving him to prove himself innocent. Such is not the American system of judicial procedure. The complaint is a fascicle of hints, inferences, innuendos, and gossip, with the wraith of an abortion hovering over all.

The defendant was found guilty upon the trial. Whether the evidence was sufficient to establish immoral, dishonorable, or unprofessional conduct we do not know, as it is not before us. But if it were, and the defendant were clearly proven

guilty, we would not be able to approve the judgment upon the complaint; for, as the complaint does not set forth facts specifying immoral, unprofessional, or dishonorable conduct, the judgment upon such complaint must be set aside.

The judgment is therefore reversed, and the case is remanded, with directions to sustain the demurrer.

Reversed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (dissenting).—The only question considered on this appeal is whether the complaint in the case states facts sufficient to constitute the charge of unprofessional, dishonorable, or immoral conduct on the part of defendant, as a physician and surgeon, practicing that profession in this state pursuant to the privilege granted under the laws thereof. (16th Sess., Laws 1889, p. 175.)

The statute provides that a board of "seven skilled and capable physicians," residents of the state, shall be appointed by the governor, with the advice and consent of the senate, as a state board of medical examiners, and invests said board with jurisdiction to make examination as to the qualification of persons applying for permission to practice the profession of physician and surgeon in this state, and, when found duly qualified, to grant a certificate to that effect. And this statute further provides that said board "may refuse or revoke a certificate for unprofessional, dishonorable, or immoral conduct"; providing, also, for appeal from the action of the board in that respect, to the district court, by the party feeling aggrieved.

Upon the charge preferred by this complaint, defendant was tried before said board of medical examiners, and found guilty of conduct of the character denounced by the statute, and thereupon his license to practice medicine in this state was declared forfeited and revoked. Defendant appealed from that judgment to the district court within and for Lewis and Clarke county, wherein the charges set forth in the complaint were, by demurrer, challenged as insufficient in substance; but, on consideration thereof, the complaint was held sufficient by the learned judges of the two departments of said court, sitting concurrently; and, as a result of the trial *de novo* which ensued

in the district court, defendant was again convicted, whereupon the judgment of the board of medical examiners was affirmed.

In considering the question as to the sufficiency of this complaint, it should be constantly borne in mind that the board of medical examiners did not assume to put defendant on trial for a criminal offense, obviously because said board had no jurisdiction of such offenses. Its inquiry deals entirely with the question whether defendant's conduct, described in the complaint, so grossly violates principles of morality and professional honor as to merit revocation of the privilege to practice medicine in this state, granted pursuant to the laws thereof, subject to revocation for conduct which violated those principles.

It is well understood that there is a broad field for human action between the boundaries of moral rectitude and honorable conduct and that of crime, wherein conduct, if afforded an opportunity, may be extremely pernicious, reprehensible, and injurious in its effect and influence both upon individuals and society at large. Unfortunate as this may be, the law does not assume to set up an ethical standard, and compel conformity thereto, regarding the ordinary relations of individuals. In general, the law wisely leaves the condemnation and punishment of moral obliquity to conscience and such other consequences as flow from transgression of the principles of morality and honor, until such conduct descends into the darker regions of moral turpitude bounded by the Criminal Code.

But while such is the state of the law generally in its operations upon conduct, there are certain relations and privileges in civilized society subject to legislative regulation, such as the practice of law and medicine, and other official and *quasi-official* relations of great honor and trust, wherein the law demands as qualification a standard of conduct higher than that which barely escapes the criminal calendar.

The physician's calling touches matters of transcendent concern—the well-being and the preservation of the human body. His equipment comprises special knowledge and agencies, whereby the secret laboratories of nature may be invaded, and its delicate functions and processes disrupted or deranged, to

the permanent injury, or perhaps destruction, of the victim of malpractice, whether happening through design or unconscionable neglect. His conduct and ministration, whether wise, honorable, and beneficial, or dishonorable and pernicious, is largely veiled in obscurity, and the assurance of fidelity therein depends almost wholly upon honor and moral integrity. The law therefore wisely and prudently demands that the high privileges and important duties of that profession be committed to those guided by principles of morality, honor, and professional ethics, and that the privilege be revoked for gross and undoubted violations of those standards of conduct. I say gross and undoubted violations, because the consequence of revocation of the privilege, on the charge of dishonorable, immoral, and unprofessional conduct, is so blighting to the social and professional career of the individual involved as to admonish tribunals charged with the administration of the law to insist that the forfeiture and revocation shall be declared on accusations of no light or indifferent character, or which fall short of charging conduct undoubtedly in violation of the principles of morality and professional honor.

The charge should be certain, and accuse defendant of such conduct as when confessed, or found from the proofs to be true, if not avoided by showing in defense that it proceeded from excusable mistake, deception, or misadvice, which would be purely matter of defense, not to be presumed, there could be no other reasonable conclusion than that the accused had been guilty of conduct which violated principles of morality and honor.

Let the complaint in the present case be examined to see whether it comes up to the test of these exactions. In point of conciseness, clearness, certainty, and particularity of averment, it compares directly to an indictment, and is subject to no criticism. If the facts set forth are well pleaded as to form and certainty of statement, the presumption is, as frequently asserted in the authorities, that the pleader stated as strong a case as the proofs will support; and if, in substance, the charge is held to be insufficient, it is no fault of the pleader. But in substance, also, in my opinion, this complaint is sufficient.

It is manifest that the learned counsel, in drawing this

complaint, fully understood that the province of the board of medical examiners was not to try defendant for violation of criminal law, but to inquire and pass upon the moral and professional aspect of his conduct, as exhibited in the facts alleged.

The complaint sets forth that, at a certain time in the jurisdiction mentioned, defendant was guilty of dishonorable, unprofessional, and immoral conduct, in that at a certain time and place, particularly described, defendant was found in possession of said fœtus, and undertook to dispose of or destroy the same, in the manner described in the complaint.

These are substantive facts, alleged with particularity and certainty, and manifest in themselves that the mother had given birth to said fœtus prematurely, and against the course of nature, and that defendant was so far concerned in that event as to have had possession and attempted to dispose of the result of such miscarriage. The learned counsel who formulated the complaint no doubt clearly apprehended also that those facts, although important, would not alone support the charge preferred against defendant, and were not, taken alone, incompatible with innocent conduct on the part of defendant in reference to the causes which may have led to said birth—no more so than the mere possession of stolen property would support the charge of larceny. The possession of stolen property, although an important fact, is not entirely inconsistent with innocence on the part of the possessor; and a man of probity could readily dispel all suspicion of dishonor and criminality by proper explanation of the circumstances which brought him into such relation with the subject of inquiry. But suppose one found in possession of stolen property should, in a proper inquiry as to how he came into such relation, reply, under oath, after great deliberation, and with legal counsel, that to answer the question would incriminate him. If the inquiry closed there, could it be affirmed that he came off with honor?

It is a well-known rule for weighing the strength of pleading to first consider what nature of case is proposed to be made out, and what character of relief is sought, and then to view the pleading, not by piecemeal, independently of the other parts,

but as a whole, giving each allegation its proper reference to and support by the whole narrative considered together.

It was not the possession and disposition by defendant of the fœtus, nor indeed his acknowledgment that, as a physician, he attended the mother who gave birth thereto, which constituted the *gravamen* of the charge of dishonorable, immoral, and unprofessional conduct; but it was his acknowledgment on oath, in a proper inquiry, after deliberation, and advice of counsel, that an investigation of the facts relating to said birth, including his conduct as attending physician, would criminate him. Such is the purport of his answer before the coroner's inquest, to avoid stating the name of the mother in question. The inquiry by the coroner was pointed directly to an investigation of the circumstances leading to the unnatural delivery, manifest by the facts shown. What could have followed disclosure of the mother's name? Simply an investigation of the facts and circumstances relating to the miscarriage. Such investigation, defendant admits, would not only tend to implicate him in malpractice and professional dishonor, but he says on oath, after deliberation, and advice of counsel, as the complaint shows, such investigation would criminate him.

Defendant's conduct as physician in relation to the subject of inquiry may have been entirely moral, honorable, and professional, but that affirmation cannot be maintained in view of his acknowledgment before the coroner's inquest.

The law, as mollified by the humane spirit of modern times, has not only dispensed with physicial torture to extort evidence of guilt, but also forbears to drive a witness to the more terrible stress of choosing betwen self-incrimination and perjury. But being brought into a position where appeal to the privilege of silence under such circumstances is necessary, because an answer would incriminate, does not signify honor. It signifies that the witness "prefers darkness rather than light" in respect to his conduct, "because his deeds are evil." It signifies that as between perjury, self-incrimination, and dishonor, by an acknowledgment that discovery or investigation of his deeds would lead to his incrimination, he chooses the dishonor cast upon him by that acknowledgment as the least of these hard alternatives. The law allows him the

privilege, and will not allow such acknowledgment to be used against him in a criminal prosecution, but does not at all undertake to shield him from the inevitable stigma of dishonor involved therein. Nor does the law forbid using such acknowledgment in cases not involving a criminal prosecution. (*Andrews* v. *Frye*, 104 Mass. 234.) The very fact that the law does not allow that acknowledgment to be used in a criminal prosecution shows how serious and weighty it is regarded. How, then, can it be affirmed that such acknowledgment is entirely consistent with innocence, honor, and morality? Nevertheless, the majority opinion holds that an entirely innocent man may have acted so, or that such action is entirely explicable on the hypothesis of innocence. Is that affirmation sound? Or can it stand against the inevitable deduction of the facts alleged in the complaint? Defendant said on oath, and with legal counsel, that investigation would incriminate him. The answer contradicts and repels the idea of innocent conduct on his part in respect to the subject of investigation. Who knew best what that investigation would reveal in respect to his conduct in the affair? If he had been entirely innocent, investigation of the facts would have shown it, and neither his honor nor liberty would have been jeopardized thereby. Would not every honorable physician, whose conduct had been innocent, have repelled with indignation even suspicion to the contrary, and invited investigation? But, on the contrary, defendant finds it necessary to ward off investigation. Why? Not to save some individual from annoyance of publicity, or even shame and disgrace in relation to the subject, but because, as he stated under oath, it would lead to his crimination. His answer was made under oath, after deliberation, and advice of counsel, and must be taken as true. It will not do to indulge the presumption, as seems to be done in the majority opinion, that his answer may have been untrue, and his conduct in reference to the subject sought to be investigated entirely innocent, because any such presumption is directly against the statement of defendant on oath, and would directly assume that he perjured himself thereby; such presumption, indulged in order to make room for the affirmation that defendant's conduct in reference to the subject of investigation by the coroner may

have been entirely innocent, involves defendant in perjury, and thus not only dishonor, but criminality; and such presumption would be set up contrary to defendant's statement, on oath, that investigation of his conduct would criminate him. Any other logical deduction seems to me, on careful consideration, impossible. Professional conduct which will not bear investigation without criminating the author of it must be dishonorable and unprofessional. It cannot be otherwise, and defendant can only clear himself of that implication of his own acknowledgment by showing two things in defense: 1. That his conduct as attending physician in relation to said premature birth was free from any practice which violated the criminal law of this state or the principles of morality and professional honor. That would show that his acknowledgment before the coroner's inquest that disclosure of the name of the mother would incriminate him was in fact untrue. 2. In order to escape from the guilt of perjury in thus answering at the coroner's inquest, under oath, he must show that he was led to such unfounded conclusion by misadvice, mistaken judgment, hallucination, or the like, which might relieve the statement of the character of willfully false testimony, and hence perjury. It would then appear to have emanated from misjudgment, probably occasioned or induced by erroneous advice. But all this is purely and entirely a matter of defense, and is not to be presumed against defendant's oath. The indulgence of any such presumption, or following a line of consideration or treatment of this case which implies such a presumption, is erroneous. No doubt the board of medical examiners and the learned judges of the district court saw clearly the situation, and the inevitable deductions which arose from the facts alleged in the complaint, and therefore held it sufficient, not as an arraignment for commission of a crime, with which the board had nothing to do, but as showing dishonorable, immoral, and unprofessional conduct on the part of defendant. I do not understand that the majority of this court deny that such conclusion must follow from the facts alleged in the complaint, as from the final excuse or explanation given by defendant of the reason why he thought this disclosure of the name of the mother would, under such circumstances as then existed,

criminate him; namely, because she had left the state, and was not subject to the jurisdiction of the courts. The majority of this court confess they cannot conceive how that fact would in any way have such effect on defendant as an innocent physician; but, nevertheless, they appear to lay great stress on that explanation in holding the complaint insufficient. Thus, the very fact in which no force can be found is made the controlling ground of decision. It is said defendant thought that circumstance augmented the chances of his crimination; and, although the very contrary is plainly true to a person of ordinary reason and experience (and he acted with advice of counsel) this explanation, which does not even possess the merit of superficial plausibility, is made the controlling and vital fact on which the decision turns. The departure of the mother left defendant a clear field to explain his "innocent conduct," without chance of the authorities obtaining contradiction from the mother, who of all others knew most intimately what his conduct was touching the affair under inquiry. It plainly lessened the chance of a guilty man being incriminated, instead of adding a circumstance to throw innocence into such fear. This assertion shows, when calmly examined, no more than a groping for some excuse or explanation to smooth down the way for the ugly acknowledgment which defendant was compelled to make. There is nothing of force in it, even if true, to frighten innocence into fear of crimination. If so, any physician called to administer to a patient who, from misfortune or weakness of nature, passes through an event of the character under consideration, and thereafter leaves the state, and the physician's conduct in respect to the miscarriage had been entirely innocent of crime, and honorable, moral, and professional, he must, nevertheless, if the event was about to be inquired into, seek to ward off such inquiry, even to swearing that it would criminate him, simply because the woman was absent from the state. This presupposes that the woman is to be entirely silent as to the facts and circumstances attending the event investigated, and that the conduct of the physician was free from any act criminal, unprofessional, or dishonorable; and he is left, in the absence of the woman, to assert and maintain his innocence. Under those circumstances,

how long would it likely take a physician in any community in this state, knowing his own innocence, and wishing to maintain his professional and personal honor, to make up his mind whether he would invite investigation, or suppress it by the serious declaration on oath that investigation would criminate him?

There has been considerable said in the majority opinion about the propriety of a physician maintaining silence in relation to events of the character under inquiry before the coroner, to shield the woman involved from annoyance, or even disgrace, which might follow publicity. We have nothing to do with that feature of the subject as a mere question of propriety; nor can it properly arise as a point for consideration in this case. No one can perjure himself for the sake of maintaining a point of propriety, at least cannot be presumed to have gone to that enormity with so small an excuse. If defendant had affirmed that personally he had nothing to fear from investigation, but declined to disclose the name of the mother on such ground, it might, with some pertinency perhaps, be introduced into this consideration; but defendant maintained no such ground for declining to further the inquiry by the coroner.

Counsel also pointed out that defendant's conduct in dallying on his oath, and changing his ground for answering the inquiry of the coroner as shown by the complaint, directly had the effect of hindering proper inquiry by the public magistrate, and this was urged as further showing dishonorable and unprofessional conduct on the part of defendant, who had been called as physician in the case. The answer made to this argument, in the opinion of this court, is that such effect of defendant's conduct is abundantly asserted in argument, but not in the complaint. To require that the pleader, after stating the facts constituting a cause of action, shall also append a statement of deductions which flow directly as consequences from those facts, contradicts and reverses many of the fundamental principles of legal pleading, and especially the rule forbidding the pleader to state the conclusions deducible from facts, but requires the statement of the facts, and leaves the ultimate con-

clusion as to the effect of such facts to be determined by the court.

The case seems, without hesitation, to have been classified as one of criminal characteristics and nature. I gravely doubt the correctness of this. It does not involve punishment by either fine or imprisonment. It involves forfeiture of a special privilege, the tenure of which depends on moral, honorable, and professional behavior. The forfeiture of a privilege or special license, or indeed an office for lack of qualification to hold it, is not generally considered, as I understand, in the nature of criminal punishment. Nor is a proceeding in the nature of *quo warranto*, attended only by finding of disqualification and disbarment from a privilege or franchise, considered a criminal proceeding, as used in modern practice.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1894.

PRESENT:

Hon. WILLIAM Y. PEMBERTON, Chief Justice.
Hon. EDGAR N. HARWOOD, } Associate Justices.
Hon. WILLIAM H. DE WITT, }

STATE, RESPONDENT, *v.* KELLOGG, APPELLANT.

[Decided June 4, 1894.]

PHYSICIANS AND SURGEONS—*Conviction for practicing without a license—Appeal.* A conviction for practicing medicine without a license will be set aside where it appeared that the defendant's license had been revoked by the state board of medical examiners and by the district court, and that defendant's conviction was had pending an appeal to the supreme court, which reversed the judgment of the district court revoking his license.

Appeal from First Judicial District, Lewis and Clarke County.

CONVICTION for practicing medicine without a license. Defendant was tried before BUCK, J. Reversed.

T. J. Walsh, for Appellant.

Henri J. Haskell, attorney general, C. B. Nolan, county attorney, and *Henry N. Blake*, for Respondent.

PEMBERTON, C. J.—The defendant was convicted in the trial court of practicing medicine without a license so to do. The defendant had, before this conviction, been tried by the state board of medical examiners on a charge of unprofessional, immoral, and dishonorable conduct, convicted on said charge by said board, and his license to practice medicine in this state revoked. From the judgment of said board the defendant appealed to the district court, where the judgment of the board was affirmed, and judgment in said court rendered, revoking his license. From the judgment of the district court the defendant appealed to this court. On such appeal this court reversed the judgment of the district court revoking defendant's license. (*State ex rel. Baldwin* v. *Kellogg, ante*, p. 426.) The judgment of conviction in this case was based upon the judgment of the district court in the case of the state board of medical examiners against this defendant, wherein his license was revoked, as aforesaid. As the judgment of the district court in said case, revoking defendant's license, has been reversed the judgment of conviction in this case must necessarily be reversed, for the reason that there is nothing to support it. Judgment reversed.

Reversed.

DE WITT, J, concurs.

STATE EX REL. HENDRICKS v. SEVENTH JUDICIAL DISTRICT COURT.

[Submitted May 14, 1894. Decided June 4, 1894.]

COMMON-LAW NUISANCE—*Penalty—Statutory construction.*—Maintaining a common-law nuisance is not punishable by both fine and imprisonment, as the penalty therefor upon conviction is limited by the express terms of the statute (Crim. Laws, § 162) to a fine of not more than one thousand dollars, and such offense is therefore not within the operation of section 278 of the Criminal Laws providing generally for imprisonment as a penalty for common-law misdemeanors not otherwise provided for in the Criminal Laws.

STATUTORY CONSTRUCTION—When the punishment of a particular offense is specially limited to a fine such provision is paramount to a general provision which designates imprisonment as a penalty for a class of offenses within which is included the particular offense.

CERTIORARI—*Appeal.—Certiorari* as auxiliary to *habeas corpus* is a proper remedy to obtain relief from an unauthorized imprisonment imposed as a penalty upon conviction for a criminal offense. An appeal from the judgment in such case would not be an adequate remedy.

ORIGINAL PROCEEDING. *Certiorari* to review a judgment imposing both fine and imprisonment for an offense for which only a fine was authorized. Judgment modified.

Middleton & Light, for Relator.

Henri J. Haskell, attorney general, M. J. McConnell, and *C. H. Loud*, for Respondent.

Per CURIAM.—By a writ of *certiorari* relator seeks review of proceedings of the district court of the seventh judicial district within and for Custer county in the case of the *State of Montana* against *Fannie Hendricks*, wherein she was indicted and convicted of the offense of maintaining a common-law nuisance; and modification of the judgment rendered by said court upon said conviction, on the ground that the penalty imposed exceeded the jurisdiction of the court. This review and modification of the judgment is sought in view of seeking discharge from imprisonment by writ of *habeas corpus* on satisfaction of the fine warranted by law. The crime charged in the information is that of maintaining a common-law nuisance, and upon conviction under that information the court assessed a penalty of three hundred dollars fine and three months imprisonment. Relator's counsel insist that the imprisonment imposed by said judgment is entirely unwarranted by law, and exceeds the jurisdiction of the court in that respect, because the statute (Crim. Laws, § 162; Comp. Stats., p. 578) provides the penalty upon conviction for said offense to be a fine of "not more than one thousand dollars."

On the other hand, the state's counsel contends that the judgment of imprisonment is warranted by section 278 of the Criminal Laws of this state, which provides that upon conviction of a misdemeanor at common law, not otherwise provided for in the Criminal Code, the punishment shall be by imprisonment in the county jail for a term not exceeding six months nor less than one month, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

It appears that the court proceeded upon this latter provision of the statute in passing sentence upon relator, but it is very clear that said section does not apply to the offense of

maintaining a common-law nuisance, because that offense, and the penalty, are especially provided for in section 162 of the Criminal Laws, which provides that every person "who shall erect or maintain any other thing which would be a nuisance at common law, every person so offending shall, upon conviction, be fined not more than one thousand dollars." There is no conflict in these statutes, because section 278 provides the penalty in case of conviction of common-law misdemeanors not otherwise provided for in the Criminal Code. That provision, then, by its own terms, does not apply to the offense of maintaining a common-law nuisance, because the statute otherwise provides the penalty for that offense. If, however, section 278 contained no clause excepting the offenses otherwise provided for in the Criminal Code, the application of a simple rule of construction—a rule which is embodied in the Code of Civil Precedure, section 631, that a special provision shall be regarded as paramount to a general provision where the two are conflicting or inconsistent—would have led the court to sentence the prisoner under section 162 of the Criminal Laws, because that section especially provides the penalty for maintaining a common-law nuisance.

The judgment should be modified by striking out that part which imposes imprisonment in addition to the fine, and it will be so ordered. The prisoner will be entitled to discharge on satisfaction of the fine imposed.

Judgment modified.

PEMBERTON, C. J., and DE WITT, J., concur.

HARWOOD, J., concurring.—Respondent, in addition to the questions treated above, raises the point of practice that this proceeding should not be entertained to review and modify said judgment, if found in excess of the penalty prescribed by statute, because, as respondent's counsel insist, relator might obtain relief by appeal.

The review on *certiorari* as auxiliary to the writ of *habeas corpus* is proper practice, because whenever relator satisfies the judgment of fine she would be entitled to discharge instantly; and ought not to be held imprisoned, even while appealing, to

avoid the consequence of the excessive and void condition of the judgment, added to that which the law sanctions. And, if not discharged on satisfaction of the fine, the prisoner would be entitled to discharge on writ of *habeas corpus*, where it was shown, as appears from this review, that "the jurisdiction of the court had been exceeded" in sentencing the prisoner, or where the "process" requiring imprisonment "had been in a case not allowed by law," or "where the imprisonment is not authorized by any provision of law."

These provisions are quoted from the first, fourth, and sixth subdivisions of section 1183, division 5, of the Compiled Statutes, relating to the writ of *habeas corpus*. In such cases the slower process of appeal is not adequate, nor, indeed, any remedy against such unlawful imprisonment as would intervene while appeal was being prosecuted. The writ of *certiorari*, as auxiliary to the writ of *habeas corpus*, is a convenient method of bringing under review, properly authenticated, the proceedings on which the judgment is founded, and in such connection we think it is properly used.

STATE EX REL. McCORMICK v. WOODY, JUDGE.

[Submitted May 24, 1894. Decided June 5, 1894.]

JUDGES—*Disqualification.*—A judge who had been attorney for an administratrix is not disqualified to try a proceeding brought by certain creditors of the estate to remove her, under section 547 of the Code of Civil Procedure, providing that a judge shall not act as such where he has been attorney for either party in the action or proceeding. Nor does the mere fact that he has an allowed claim against the estate disqualify him from trying such proceeding.

ORIGINAL PROCEEDING. Application for writ of prohibition to restrain a district judge from trying a proceeding to remove an administratrix. Denied.

J. C. Robinson, for Relator.

Judge Woody was disqualified to act as judge in the matter. He has a claim against the estate, and is interested therein. (Hawes on Jurisdiction, § 35; *Stockwell* v. *Township Board etc.*, 22 Mich. 342; *Pearce* v. *Atwood*, 13 Mass. 340; *Hall* v. *Thayer*,

105 Mass. 219; 7 Am. Rep. 513; Probate Practice Act, § 10.) Prohibition is the proper remedy. (*North Bloomfield G. M. Co.* v. *Keyser*, 58 Cal. 327 (facts much as in this case); 19 Am. & Eng. Ency. of Law, 272, note n, 6, and cases; *State* v. *Judge*, 38 La. Ann. 247; *Gaines* v. *Rugg*, 148 U. S. 243; *United States* v. *Shanks*, 15 Minn. 369; *Appo* v. *People*, 20 N. Y. 542.)

Per CURIAM.—This is an application for a writ of prohibition to prevent the respondent, judge of the fourth judicial district court, from trying a certain proceeding, which is described in the petition. That proceeding is an application by some of the creditors of the estate of W. J. McCormick, deceased, for the removal of the relator as administratrix of the estate. She alleges in her application for a writ of prohibition that the judge of the court, Hon. Frank H. Woody, should be prohibited from trying this case, for the reason that he is disqualified. This disqualification she finds in the following facts, which she alleges: "That the said Woody, the said judge of said court, was for a long time after the death of said decedent, W. J. McCormick, the retained attorney and advisor of this affiant, as such administratrix, and, as such attorney, attended to various matters and business for the said administratrix and said estate; and that the said Frank H. Woody, said judge of said court, in due time after appointment of this affiant as such administratrix, presented, and there was allowed to him, a claim against the said estate in the sum of seventy-one dollars, and which said claim and demand has not been paid, but now stands as a valid and existing claim and demand against the said estate; and that, by reason thereof, he, the said judge, is interested in the said estate, and is thereby disqualified from acting in any manner as the presiding judge therein."

Without suggesting an opinion as to whether the writ of prohibition is the proper remedy (for such question has not been raised or argued), we will notice the question of the alleged disqualification of the judge. There are practically two grounds set out: 1. That Judge Woody had been counsel for the administratrix; and 2. That he is interested in the estate

to the extent of seventy-one dollars, owing to him by the estate.

As to the first ground, the statute provides (Code Civ. Proc., § 547) that a judge shall not act as such in an action or proceeding when he has been attorney or of counsel for either party in the action or proceeding. But Judge Woody has never been attorney or of counsel for either party in the action or proceeding which the relator wants him prohibited from trying. That proceeding was brought to remove the relator as administratrix. It does not appear that relator is sought to be removed on any thing that occurred while Judge Woody was her counsel. We are of opinion that the statute (§ 547) does not mean that, if a judge has once been an attorney or of counsel for a person he shall, if he afterwards become judge, be forever prohibited from acting as judge in cases in which such person may be a party, and in which cases the judge has not been attorney or of counsel, and in which he has taken no part whatever. If such construction of the statute were to obtain, the judges of courts would be disqualified in a very large proportion of the cases which came before them; for judges are elected from among the practicing lawyers of the district, and, in the course of their lives as practitioners, have been attorneys and of counsel for large numbers of persons in their district. It is not intended that the judge shall be disqualified because he has once been an attorney for a party litigant, in a matter other than that proposed to be litigated before him.

The statute also provides that the judge shall not act as such in an action or proceeding in which he is interested. It is set up that Judge Woody has a claim of seventy-one dollars against the estate of which relator is administratrix, and from which position she is sought to be removed. This claim of Judge Woody was for services to Mrs. McCormick as administratrix, and had been allowed against the estate. The question here is not as to the estate itself. It is not as to claims against the estate or in favor thereof. It is not as to allowing Judge Woody's debt, or any other. But the contention for trial before the fourth judicial district court is as to the removal of Mrs. McCormick as administratrix. Is the fact that the judge

of the court has an allowed claim against the estate evidence that he is interested in the removal or retention of a particular person as administratrix? It is not shown, or claimed, or suggested that the retention or removal of the relator as administratrix would, or could, or was likely to, affect Judge Woody's claim against the estate or its payment.

It does not appear that the estate will not pay all of its debts in full, or that such a result is likely or possible; and it does not appear that the retention or removal of the relator as administratrix could affect the debt-paying qualities of the estate, either favorably or unfavorably. Indeed, it does not appear that Judge Woody's allowed claim of seventy-one dollars against the estate can be affected in any manner, proximately or remotely, directly or indirectly, in the proceeding brought for the purpose of removing the administratrix; nor does it appear that Judge Woody is one of the creditors seeking her removal, or in any way interested in said proceeding.

We are satisfied that there is no showing in this application that Judge Woody is disqualified. The writ will therefore be denied.

All concur.

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STATE, RESPONDENT, v. MARION ET AL., APPELLANTS.

[Submitted May 21, 1894. Decided June 5, 1894.]

INDICTMENT—*Duplicity—Sale of liquors where women are employed.*—An indictment, drawn under section 261 of the Criminal Laws, prohibiting the sale of liquors in any place where women are employed or allowed to assemble for the purpose of the business therein carried on, which charges the sale of liquor where women are both employed and allowed to assemble, is not void as charging two offenses.

SAME—*Indorsement.*—An indictment against two persons, upon which is indorsed the name of only one, is not bad under section 150 of the Criminal Practice Act, requiring certain indorsements on the indictment, but not providing that the title of the case shall be indorsed in full.

CRIMINAL JUDGMENT.—A judgment upon conviction in a criminal case which provides for punishment by fine and imprisonment is not void in that it further provides that the fine shall be enforced as a civil judgment.

Appeal from Second Judicial District, Silver Bow County.

CONVICTION for sale of liquor in a place where women are employed. Defendants were tried before SPEER, J. Affirmed.

George Haldorn, and *C. L. Campbell*, for Appellants.

Henri J. Haskell, attorney general, and *M. L. Wines*, for the state, Respondent.

Per CURIAM.—Appeal from judgment of conviction of selling intoxicating liquors in a place where women are employed and allowed to assemble for the purposes of the business therein carried on, under section 261 of the Criminal Laws. (Comp Stats., p. 578.) Appellants' counsel insist that the indictment upon which the conviction was had charges two offenses, and is thereby void.

The statute under which the indictment was drawn reads as follows: "That hereafter it shall be unlawful for any person or persons, company, or corporation to sell or dispose of any spirituous, vinous, or malt liquors in any room, hall, or other place where women or minors are employed or allowed to assemble for the purpose of the business therein carried on." (Crim. Laws, § 261.)

The charging part of the indictment reads as follows: "That one Charles Marion and F. Barnett, late of the county of Silver Bow, state of Montana, on or about the nineteenth day of January, A. D. 1894, at the county of Silver Bow, in the state of Montana, did keep, maintain, conduct, and carry on the business of selling and disposing of spirituous, vinous, and malt liquors, in that certain room and hall known as '11 and 13 South Main street,' in the city of Butte, county of Silver Bow, state of Montana, and did then and there willfully and unlawfully sell and dispose of spirituous, vinous, and malt liquors (a more particular description of which is to the grand jurors aforesaid unknown) to one John Doe (whose true name is to the grand jurors aforesaid unknown), and to divers and sundry other persons (whose true names are to the grand jurors aforesaid unknown). They, the said Charles Marion and F. Barnett, did then and there unlawfully allow one Jennie Roe (whose true name is to the grand jurors aforesaid unknown) and divers and sundry other women (whose true names are to the grand jurors aforesaid unknown) to assemble in the aforesaid room or hall for the purpose of sell-

ing and disposing of malt, spirituous, and vinous liquors, she, the said Jennie Roe, and divers and sundry other women, then and there being in the employ of the said Charles Marion and F. Barnett, for the purpose of selling and disposing of malt, spirituous, and vinous liquors."

Upon careful consideration, we are drawn to the conclusion that the indictment herein does not charge two offenses, but charges one offense—that of selling intoxicating liquors in a place described, where the women mentioned were employed and assembled for the purpose of the business therein carried on. The indictment charges but one criminal act—that is, the selling of intoxicating liquors under the conditions alleged; but the indictment describes the women mentioned as sustaining two relations to the place—that of employment and assemblage for the purpose of the business where the liquor was sold. The presence of both conditions, or either, at the time and place of selling the intoxicating liquor, makes the act of selling criminal under said statute. This statute declaring the act of selling intoxicating liquor under either of the several conditions mentioned to be criminal is similar in its provisions to the statute defining assault with a deadly weapon with intent to inflict a bodily injury where no considerable provocation appears, or where the circumstances of the assault show an abandoned or malignant heart. (Crim. Laws, § 60; Comp. Stats., p. 511.) The averment in an indictment that an assault was committed, with all the conditions mentioned in said statute present and operating, would charge but one assault, therefore but one offense; while the indictment would describe two conditions accompanying and operating in the assault, either of which, or both combined, would make the offense complete, but would show only one offense—that of assault with intent, etc. So in other cases, such as committing criminal nuisance, where the act perpetrated, or the conditions maintained, may combine several elements, either of which alone would amount to the offense, yet the indictment is not subject to the objection of duplicity because it describes an act combining several such elements. (Wharton's Criminal Pleading and Practice, § 251, and cases cited.)

It is further objected that the indictment is not properly

indorsed, because it is an indictment of Charles Marion and one Barnett for the offense mentioned, and is indorsed "*State of Montana* v. *Charles Marion et al.*" Defendants' counsel insist that this style of indorsement is insufficient, and that his motion to quash on that ground, interposed in the trial court, should have been sustained. We think not. The statute does not require that the title of the case shall be indorsed in full, or otherwise, on the bill; but does require certain other indorsements to appear thereon. (Criminal Practice Act, § 150 et seq.)

It is also urged that the judgment pronounced on this conviction exceeds the jurisdiction of the court, in that the judgment provides for punishment by fine in a certain sum, with costs, and also for imprisonment a certain period, and then adds that the judgment for fine and costs shall be enforced as a civil judgment, if property of defendants can be found. This, appellants' counsel urge, is a double judgment, and that thereunder defendants might be imprisoned for nonpayment of the fine and costs after collection thereof by execution. We are satisfied that the judgment is not subject to such construction, nor is it likely to be so interpreted by the court in carrying it into execution.

A careful consideration of the record upon all the points presented discloses no ground for reversal. The judgment will therefore be affirmed, and ordered carried into effect by the trial court, according to the terms and conditions thereof.

Affirmed.

All concur.

STATE, RESPONDENT, v. McGINNIS ET AL., APPELLANTS.

[Submitted May 21, 1894. Decided June 5, 1894.]

See *syllabus* and opinion in the case of *State* v. *Marion*, *ante*, p. 458.

Appeal from Second Judicial District, Silver Bow County.

CONVICTION for sale of liquor in place where women are employed. Defendants were tried before SPEER, J. Affirmed.

George Haldorn, and *C. L. Campbell*, for Appellants.

Attorney General Henri J. Haskell, and *M. L. Wines*, for the state, Respondent.

Per CURIAM.—This case, on appeal, involves questions for consideration and determination entirely like those considered in the case of *State* v. *Marion* (just considered and determined), *ante*, p. 458, and, upon the conclusions there reached, the judgment herein must be likewise affirmed.

It will therefore be ordered that the judgment in the above-entitled cause be, and is hereby, affirmed, and that it be carried into effect by the trial court, according to the terms and conditions thereof.

Affirmed.

All concur.

BARDEN, COUNTY TREASURER, RESPONDENT, v. WELLS, APPELLANT.

[Submitted June 4, 1894. Decided June 11, 1894.]

STATUTORY CONSTRUCTION—*Tax lien on personal property—Repeal by implication.*—The general and comprehensive revenue act of 1891 which gives an express lien for taxes upon real estate, without mentioning personal property, and which repeals all acts or parts of acts inconsistent with its provisions, though apparently intended to cover the subject of levy and collection of taxes, cannot for that reason be interpreted to repeal by implication the lien for taxes upon personal property given by section 2 of the revenue act of 1887.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to enforce tax lien upon personal property. Tried before HUNT, J., upon an agreed case. Plaintiff had judgment below. Affirmed.

Toole & Wallace, for Appellant.

Taxes become a lien on property only by force of positive and direct legislation. (*State* v. *O'Neill*, 55 N. J. L. 58. And by way of illustration of workings of above principle, see American Digest 1892, p. 4906, Nos. 424, 425.) It is not contended by respondent that sections 82 and 83, pages 104 and 105 of the Laws of 1891 create a lien on any thing but real estate; but it is claimed that section 2 of the act of September 1887, page 83—which we concede did, while in force, clearly create a lien on personalty—is yet in force and operated to create a lien on personalty for taxes assessed in the year 1893. We submit: 1. That, as section 2 of the act of 1887—even were it now in force—by its express language only creates a lien on personalty assessed under the provisions of that act (i. e., act of 1887), the assessment for the year 1893 must have been made—to have been legally made—under the act of 1891, and the language of section 2 of the act of 1887 is not broad enough to cover the 1893 assessment; 2. That the general revenue act of 1891 providing as it did a comprehensive and complete scheme for the collection of all kinds of taxes, under and in accordance with the then new state constitution, clearly was and must have been intended by the legislature to entirely replace and supplant all other acts for the collection of revenue, including the act of 1887. (*People* v. *Burt*, 43 Cal. 561, 563; *State* v. *Conkling*, 19 Cal. 501, 512, 513; *City of Sacramento* v. *Bird*, 15 Cal. 294; *Fraser* v. *Alexander*, 75 Cal. 152; *Roche* v. *Mayor of New Jersey*, 40 N. J. L. 257, 262; *United States* v. *Claflin*, 97 U. S. 551, 552; Sedgwick on Statutory and Constitutional Law, 124; Endlich on Interpretation of Statutes, §§ 200, 201, 245.) Since the submission of this matter to the district court, a case squarely in point has been decided by the supreme court of the state of Washington. (*Baer* v. *Choir*, 7 Wash. 631.)

County Attorney C. B. Nolan, for Respondent.

Per CURIAM.—The sole question involved in this case, as developed by an agreed statement of facts, is whether a lien

for taxes attaches to personal property under the laws of this state relating to the levy and collection of taxes.

Counsel agree that, by the provisions of section 2 of the revenue act of 1887, such lien undoubtedly attached to personal property for the tax levied thereon, and is extinguished only by payment. But in 1891 there was enacted by the legislative assembly another general and comprehensive act upon the same subject, apparently intended to, and which does to a great extent, cover the subject of levy and collection of taxes, but contains no provision like that of section 2 of the act of 1887, declaring that the tax levied on personal property should constitute a lien thereon; and thereby counsel for appellant contends that, by implication, there is manifest the legislative intention that the pre-existing statute to that effect, although not expressly repealed, became nugatory, and that no such lien can now be enforced against personal property to secure payment of the tax levied thereon. Appellant's counsel urge this proposition by pointing to the fact, apparent from an inspection of the act of 1891, that the subject of the levy and collection of taxes appears to have been generally provided for therein, even to providing that the tax levied upon real property and improvements thereon, whether the improvements were assessed to the owner of the soil or to another, should constitute a lien on such property, and further providing the method of enforcement thereof; but that act entirely omitted provision creating a lien on property strictly personal, to secure the payment of the tax levied thereon. Thereby, appellant contends, is manifest, without doubt, an intention that personal property should not be encumbered by such lien. He brings to the support of this line of reasoning citation of a number of well-considered cases: *State* v. *O'Neill*, 25 N. J. L. 58; *People* v. *Burt*, 43 Cal. 561, 563; *State* v. *Conkling*, 19 Cal. 501, 512, 513; *City of Sacramento* v. *Bird*, 15 Cal. 294; *Fraser* v. *Alexander*, 75 Cal. 152; *Roche* v. *Mayor*, 40 N. J. L. 257, 262; *United States* v. *Claflin*, 97 U. S. 551, 552; Sedgwick on Statutory and Constitutional Law, 124; Endlich on Interpretation of Statutes, §§ 200, 201, 245; *Baer* v. *Choir*, 7 Wash. 631.

Counsel for the state, on the other hand, insist that the rule

of interpretation contended for by appellant, although well founded in reason and authority as proper *indicia* of legislative intent where applicable, is not applicable in the present instance, because the legislative intention as to what pre-existing statutes should be superseded or repealed by the act of 1891 is distinctly expressed therein, and need not be sought by implication. Section 205 of the act of 1891, containing the repealing clause, is pointed to as expressing the exact intention of the legislature on that point. This section provides that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." This provision, counsel for appellant contends, expressly indicates the intention on the part of the legislature that its act of 1891 should only supersede prior statutes on the subject of the levy and collection of public revenue in so far as the provisions of the prior statute were found to be "inconsistent with the provisions of this act" of 1891; that where the intention of the legislature is clearly manifested by that character of provision, there is no room for the application of the doctrine of repeal by implication of all former laws on the subject, as contended for by appellant's counsel. But in such a case another rule of interpretation intervenes, and considers repealed or superseded just what the legislature expressly declares should be, and no more, i. e., such prior statutes as were found inconsistent with the latter enactment, which is clearly and conveniently ascertainable by comparison. This position is supported also by citation of authorities: *United States* v. *Gear*, 3 How. 120; *Lewis* v. *Stout*, 22 Wis. 234; *Carruthers* v. *Commissioners*, 6 Mont. 482; Endlich on Interpretation of Statutes, § 210; 23 Am. & Eng. Ency. of Law, 487; *State* v. *Pollard*, 6 R. I. 290; *Patterson* v. *Tatum*, 3 Saw. 164; Fed. Cas. No. 10,830; Cooley on Taxation, 199.

The trial court adopted the view contended for by respondent's counsel, and held that the lien for the taxes in question, levied on personalty, attached thereto by virtue of section 2 of the revenue act of 1887, because there was no provision in the act of 1891 inconsistent therewith. Our consideration of the point in controversy, aided by light derived from the able argument of counsel, together with the provisions of the statute and the authorities cited, lead us to the conclusion that the trial

court ruled correctly, and ought to be affirmed. To apply the doctrine contended for by appellant would be simply saying to the legislative assembly: "Although you expressly declared that you intended by the act of 1891 to supersede and repeal former statutes only in so far as the same are found inconsistent with the act of 1891, on the subject of the levy and collection of revenue, still therein you did not declare your real intention, but in fact you intended to repeal or supersede all former provisions on that subject, whether inconsistent with the act of 1891 or not." This would seem to be a strained and unnatural interpretation of the legislative expression under consideration.

It is not at all incompatible with reason and experience to conclude that although attempting in the act of 1891, and largely succeeding, in making a complete revenue act, yet, in contemplation of the difficulty of the task, the manifold details to be provided for, and being aware that the most painstaking endeavor might omit some important ones, the legislature may, as a prudential safeguard, have concluded that, in first launching the act, it would be wise to repeal only such provisions of the former statute on that subject as were covered by provisions of the latter, leaving in force the other provisions to supply unforeseen defects in the latter law. If such were the contemplation and intention of the legislature, and we think it was, it would have been aptly and sufficiently expressed and carried into effect by the provision of section 205, quoted above.

Judgment of the trial court affirmed. *Affirmed.*

All concur.

QUIRK, RESPONDENT, v. MULLER, APPELLANT.

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[Submitted June 4, 1894. Decided June 11, 1894.]

CONTRACTS—*Validity—Public policy—Procurement of testimony.*—A contract by which plaintiff, in effect, agreed to procure testimony that would win a lawsuit for defendant, for which services he was to receive a commission upon the amount recovered, is void as against public policy and as tending to impede the administration of justice.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION upon contract. Judgment was rendered for plaintiff below by HUNT, J. Reversed.

Statement of the case by the justice delivering the opinion:

This is an appeal from the judgment, upon which the only contention made is that the complaint does not support the judgment. (*Gillette* v. *Hibbard*, 3 Mont. 412.)

The action was for compensation for certain personal services rendered by plaintiff to defendant, under an alleged contract. The complaint is somewhat voluminous, but the portions material to this inquiry may be stated therefrom as follows: One Buyck was in possession of certain property of defendant herein, Anna Muller, under a deed from said Muller to Buyck, which she claimed was fraudulent. She desired to recover possession of this property. It may be stated in passing that the action which she brought for that purpose was finally decided in this court under the title of *Muller* v. *Buyck*, and reported in 12 Mont. 354.

The complaint in this case then alleges that she, Anna Muller, "made and entered into an agreement with this plaintiff, whereby she employed this plaintiff to make search and inquiry, and ascertain the names of persons who were familiar with the said property, and acquainted with the defendant and the said Sully Buyck, and with the facts and circumstances connected with the execution of the instrument aforesaid, and of the financial circumstances of the said Sully Buyck, and to procure such other testimony which, when introduced in court in an action duly and regularly brought, would entitle the said defendant to the possession of the said property, and the cancellation of the said instruments, and restore her to all her

rights in and to said property; and the said defendant then and there promised and agreed that if this plaintiff would ascertain and procure the names of such witnesses, whose testimony would enable her to recover her rights in and to said property, and the possession thereof, that she, the said defendant, would pay to this plaintiff, for such services, an amount equal to ten per cent of the value of the property so recovered, to be paid when the said property would be recovered; and plaintiff agreed and entered upon said employment, and procured the names of witnesses to establish said facts, if such witnesses could be procured. That thereupon this plaintiff, relying upon said agreement, commenced an investigation of the facts and circumstances connected with the execution of the instruments aforesaid, and to obtain all information he could with reference to the said Sully Buyck, and to procure the names of persons who were familiar with the facts and circumstances relating to the ownership of the said property, and with the execution of the said instruments, and the financial condition of the said Sully Buyck, and the consideration that was paid for said property, and the source from which such consideration was derived, and all other facts necessary to establish the right and title of the said Anna Muller in and to the property aforesaid; and plaintiff avers that he did procure the names of witnesses who were familiar with the facts aforesaid, and did secure sufficient testimony to establish defendant's right, title, and interest and claim in and to said property, and each and every part thereof."

The complaint then goes on to set up the commencement of the action of *Muller* v. *Buyck*, and the trial thereof, and the judgment in favor of Muller. Speaking of the trial of that case, the complaint alleges: "And the said testimony procured by this plaintiff in his said employment was introduced, and the witnesses whose testimony he procured were produced and testified in said action in behalf of said Anna Muller; and, upon due consideration of said testimony, the court adjudged and decreed," etc.

The judgment being for the plaintiff in this action, the defendant appeals.

J. M. Clements, for Appellant.

The alleged contract sued on is champertous and void. It is a hiring of respondent to do an illegal act, i. e., to procure testimony, which, when introduced in court in an action duly and regularly brought, would enable appellant to recover rights in, and possession of, property, in consideration of her promise to pay him "an amount equal to ten per cent of the value of the property so recovered," when recovered. (Compiled Statutes, pp. 583, 647, §§ 201, 278; 2 Parsons on Contracts, 8th ed., 765; 2 Bishop's Criminal Law, § 121; *Sprye* v. *Porter*, 7 El. & B. 58–81; *Stanley* v. *Jones*, 7 Bing. *369–*76; *Stevens* v. *Bagwell*, 15 Ves. 139–56; *Hilton* v. *Woods*, L. R. 4 Eq. C. 432–39; *Boardman* v. *Thompson*, 25 Iowa, 495–507; *Barker* v. *Barker*, 14 Wis. *131–*41; *Allard* v. *Lamirande*, 29 Wis. 502; *Coquillard* v. *Bearss*, 21 Ind. 479; 83 Am. Dec. 362; *Lafferty* v. *Jelley*, 22 Ind. 471; *Holloway* v. *Lowe*, 7 Port. 488; *Meeks* v. *Dewberry*, 57 Ga. 263; *Martin* v. *Clarke*, 8 R. I. 389, 403; *Ackert* v. *Barker*, 131 Mass. 436; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Johnson*, 29 Kan. 218–27; *Brown* v. *Beauchamp*, 5 T. B. Mon. 413; 17 Am. Dec. 81; *Kelly* v. *Kelly*, 86 Wis. 170; *Byrne* v. *R. R. Co.*, 55 Fed. Rep. 44; *Lucas* v. *Allen*, 80 Ky. 681.) As to attempted evasions of the law against champerty: *Martin* v. *Amos*, 13 Ired. 201; *Munday* v. *Whissenhunt*, 90 N. C. 458; *Backus* v. *Byron*, 4 Mich. 535; *Elliott* v. *McClelland*, 17 Ala. 206; *Dumas* v. *Smith*, 17 Ala. 305.

Walsh & Newman, for Respondent.

The contract is not champertous. The complaint shows that the defendant was the owner of certain property; that she, while intoxicated, and while confidential relations existed between her and Buyck, was induced by fraudulent representations made by him to sign an instrument which purported to convey all the property to him; and by virtue of that instrument he went into possession of that property, claimed to be the owner thereof, and excluded the defendant Muller therefrom. The defendant desiring to recover possession of the property, and to cancel said instrument, and being ignorant of

the names of the persons who had personal knowledge of the facts which would enable her to recover her property, employed plaintiff to make search and inquiry to ascertain the names of these persons, and to look up other testimony for her. This is a legitimate contract. Parties litigant, or contemplating litigation, often employ others to search for witnesses, to follow and trace them from city to city or from state to state, that their testimony may be procured, or to search records or to procure other competent testimony to be used at the trial of the cause. The persons doing such work are entitled to compensation, and that compensation may be measured by the amount of time employed, the value of the services to the employer, or in such other manner as the parties may agree. In this case the compensation agreed upon was an amount equal to ten per cent of the value of the property of which possession was to be recovered. The doctrine of champerty and maintenance has undergone such a change that "ancient law" cannot be considered authority. To make a contract champertous under the ancient law there should be a bargain to receive part of the property in litigation. But such contracts are not now held void. They have been upheld in California and many other states. (*Howard* v. *Throckmorton*, 48 Cal. 482; *Ballard* v. *Carr*, 48 Cal. 74; *Hoffman* v. *Vallejo*, 45 Cal. 564; *Mathewson* v. *Fitch*, 22 Cal. 86; *Ramsey* v. *Trent*, 10 B. Mon. 341.) Where the contract specifies that the party shall receive as compensation an amount equal to a certain percentage of the value of the property recovered, as in this case, the contract will be upheld. (*McPherson* v. *Cox*, 96 U. S. 404; *Stanton* v. *Embrey*, 93 U. S. 548; *Wright* v. *Tibbitts*, 91 U. S. 252; *Taylor* v. *Bemis*, 110 U. S. 42; *Jeffries* v. *Mutual L. Ins. Co.*, 110 U. S. 305.) In 3 Am. & Eng. Ency. of Law, 78, an exhaustive list of authorities is cited in support of this proposition.

DE WITT, J.—We are of opinion that the complaint is not sufficient to sustain the judgment. The learned district judge would have doubtless so held if the point had been made before him. We believe that the contract set out in the complaint is void as against public policy, and as tending to impede the

administration of justice. The plaintiff was employed, not only to make search and inquiry for witnesses, and to ascertain the names of persons acquainted with the facts and circumstances, but also, in addition to this, to procure such other testimony which, when introduced in evidence, would entitle the said Anna Muller to recover possession of the property. The searching for witnesses who had disappeared or documents which had been lost, or the performance of legitimate detective work, is not subject to objection. But the plaintiff was, according to his contract, to do more than this. These things he was to do, but they were not considered sufficient. He added to them, and contracted, in connection with them, that he would, in effect, procure testimony that would win a lawsuit. It is alleged further, in effect, that the testimony which he thus procured did win the lawsuit. Indeed, the contract, brought down to a simple statement, is that plaintiff agreed, for a consideration, to procure testimony that would win the lawsuit. He procured the testimony, and it won the suit.

We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury, but the contract had the tendency and opened the very strong temptation to the procurement of perjury.

Mr. Bishop says: "The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." (Bishop on Contracts, § 476.)

In the case of *Wellington* v. *Kelly*, 84 N. Y. 543, the court found that the particular contract there under review was a legitimate and proper one, but, upon the general principle of contracts to furnish evidence for a lawsuit, Judge Andrews, in the opinion, says: "In *Stanley* v. *Jones*, 7 Bing. 369, it was held that an agreement made by a third person to communicate to a person claiming to have been defrauded, such information as would enable him to recover damages for the fraud, and to exert his influence to procure evidence to substantiate the claim, upon condition of receiving portion of the sum recovered, was illegal. In that case the person making the agreement to communicate the information was an entire

stranger in interest to the proposed litigation, and professed to have knowledge of facts of importance to the party, but which he did not disclose. Lord Denman said that such an agreement was illegal, from its manifest tendency to prevert justice, and we fully assent to the decision in that case. An agreement by a stranger to furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous in its tendency, as furnishing an inducement for perjury and the subornation of witnesses." In the English case cited in the New York Report, the person contracting to furnish the evidence agreed that "he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant." (*Stanley* v. *Jones*, 7 Bing. 379.) There is a very considerable similarity between the contract which was condemned by the English court and that which is now before us.

The supreme court of Illinois took occasion, in the case of *Gillett* v. *Board*, 67 Ill. 256, to treat this subject in very vigorous and pertinent language. A case was about to be tried involving the legality of an election to determine whether the county should subscribe for certain railroad bonds. The legality of the election which had been held being questioned, and the county supervisors, apparently desiring to overthrow the result of the election, made certain contracts as to the procuring of testimony to attack the result of that election. In the contract which the supervisors made with one McNeal, they provided as follows: "That if he [McNeal] will hunt up testimony, and prepare the same, and present it to the proper authorities who may be authorized to receive it, and, after said testimony or evidence is fully received and shall be acknowledged as legal, then, for said services, said McNeal is to receive from Logan county the following amounts: For ten illegal votes, so proved, $100; for ten other illegal votes, so proved, $200; for ten other illegal votes, so proved, $300; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400; for ten other illegal votes, so proved, $400. The above-mentioned illegal votes must be in place of, answer to, or rep-

resent certain unknown names on the East and West Lincoln poll-books of the election above mentioned. The condition of this obligation is such that the said McNeal is to pay all his own individual expenses and the expenses of any parties whom he may employ in preparing such testimony, and finding such testimony, and finding such witnesses; and that above amount, or any part of the same, shall not be due or payable until the illegality of such votes is legally proven. It is further agreed that, in case the county of Logan is finally released from any liability to pay said bonds now in dispute between said county and the P. L. and D. R. R. Company, by means of proving the majority in said election to be illegal, the county of Logan further agrees to pay said M. B. McNeal the sum of twelve hundred dollars, which said amount is to be in addition to the scale of prices above mentioned, and payable only after the courts have decided the case in favor of the said county."

The supreme court of Illinois in passing upon this contract, said: "The evidence disproved the actual use by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors and to make use of other 'base appliances' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end. Should such contracts of this character receive countenance we might, among the multiplying forms of agency of the time, have to

witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court for pay, contingent upon success in their suits. In *Marshall* v. *Railroad Co.*, 16 How. 314, it was held that a contract or a contingent compensation for obtaining legislation was void by the policy of the law. With much greater reason, we think, should the contracts under consideration be held vicious. We cannot sanction them. On account of their corrupting tendency we must hold them to be void, as inconsistent with public policy." (*Gillett* v. *Board*, 67 Ill. 256. See, also, *Patterson* v. *Donner*, 48 Cal. 369.)

We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff Quirk may have performed only innocent acts, and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out were other than wholly innocent and lawful. But the contract was just such an one as to encourage an unlawful act. It invited subornation of perjury. It held out a large reward for success. The amount claimed by plaintiff was some $1,800. The obtaining of this large sum depended upon plaintiff procuring testimony which would win the lawsuit. The law does not tolerate the offering to any one, no matter how virtuous, of such temptations to crime. The evils and vices of such a contract are strongly stated in the language of the Illinois court, quoted above. It would, indeed, be a sad spectacle to see springing up in this state the business of procuring testimony sufficient to win lawsuits. We regretfully express the fear that perhaps such a business might find a patronage. But from such a result we will secure ourselves by declaring void a contract the manifest tendency of which is to present the direct temptation and the great inducement to one to procure subornation of perjury. There is here too close an approach to the evil maxim, sometimes quoted: "Get money; honestly, if you can; but get money." The contractor in plaintiff's position could only too easily be led to say to his conscience: "I will procure the necessary testimony; honestly, if I can; but I

will procure the testimony." The evils of such contracts are illustrated in the very case for which this plaintiff contracted to procure the testimony which would succeed in winning a judgment for plaintiff therein. That case was before us on appeal, and was reported in 12 Montana, 354. In our investigation it appeared that practically the only witness for the plaintiff was herself. It seems that the case rested solely upon the testimony of plaintiff Muller and the defendant Buyck. So, if it be true that plaintiff herein, Quirk, procured the testimony which won the judgment in *Muller* v. *Buyck*, he procured the plaintiff herself to testify, and the only construction of the situation by which it could be claimed that he procured any testimony would be that he procured or instructed her to testify as she did, because it was her testimony that won the case. It does not appear, on an inspection of the decision in that case, that plaintiff herein did or could have rendered service of such nature, or any other. We speak of this as an illustration of the evil tendency of such a contract as is pleaded in the complaint in this case.

We think that nothing here said can be interpreted as forbidding the offering of rewards for the detection of crime, or the employing of persons to search for material witnesses or important papers or documents or exhibits which have been lost. We think that no difficulty will arise in sustaining contracts for the performance of legitimate services, while the stamp of disapproval is put upon contracts clearly *contra bonos mores*.

The judgment is reversed, and the case is remanded, with directions to dismiss the complaint.

Reversed.

PEMBERTON, C. J., and HARWOOD, J., concur.

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STATE EX REL. COLEMAN ET AL. v. DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR DEER LODGE COUNTY.

[Submitted June 5, 1894. Decided June 11, 1894.]

ROADS TO MINING CLAIM—*Condemnation procedure—Constitutional construction.* The provisions of section 15, article III, of the constitution that the necessity for, and the damages occasioned by, the opening of private roads shall first be determined by a jury, does not abrogate sections 1495 et seq. of the general laws, granting to the owners of mining claims a right of way across the claims of others, and providing for the assessment of damages by commissioners, but merely modifies the statute as to the method of determining the damages, leaving the jurisdiction and procedure in other respects unchanged.

ORIGINAL PROCEEDING. Application for writ of mandate to compel a district court to entertain a petition to open a private road across a mining claim. Writ granted.

George B. Winston, and *W. W. Dixon*, for Relators.

C. P. Connelly, for Respondent.

Per CURIAM.—Application for writ of mandate to the judge of the district court of the third judicial district within and for Deer Lodge county.

It appears that relators filed with the clerk of said court a duly verified petition, as follows:

"IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF DEER LODGE.

WILLIAM COLEMAN AND THOMAS MCGUIRE, *Plaintiffs*,
vs.
WILLIAM LORENZ, *Defendant.*

"The plaintiffs complain of the defendant, and allege: 1. That, at all the times hereinafter mentioned, the plaintiff William Coleman had declared his intention to become a citizen of the United States, and that the plaintiff Thomas McGuire was, at all the times hereinafter mentioned, a citizen of the United

States, and that the plaintiffs were, at all the times hereinafter mentioned, and are now, citizens and residents of the county of Deer Lodge in the state of Montana. 2. That the plaintiffs are, and have been since April 4, 1894, the owners of, and are in the peaceable and quiet possession of, the following described mining claim, situated and lying in the county of Deer Lodge, in the state of Montana, to wit, the Alice placer claim, which is located about five miles from the city of Anaconda, in said county of Deer Lodge, in a westerly direction, and on Warm Springs creek, and in section number twenty-five, in township number five, north of range twelve west. 3. That the defendant occupies a certain mining claim, located just east of the mining claim of the plaintiffs above described, which is described as follows, to wit: Beginning at a point from which a certain notifications take set upon the premises bears south 62 degrees east, 400 feet distant (said notification stake is located north 30 degrees 55 minutes west from the quarter section corner, between sections 25 and 36, in township five, north of range twelve west, and is 1,424 feet distant therefrom), thence north 28 degrees east 700 feet, thence south 62 degrees E. 800 feet, thence south 28 degrees W. 1,700 feet, thence N. 62 degrees W. 800 feet, thence N. 28 degrees E. 1,000 feet to the place of beginning, the said claim being situated in the southwest quarter of section 25, in township five, north of range twelve west, in the county of Deer Lodge, in the state of Montana. 4. That the location of the said claims with reference to each other is shown by and on the map hereto attached, marked 'Exhibit A,' and made part hereof, and is hereby referred to for a more particular description of the said claims. 5. That the said mining claim of the plaintiffs is so situated that it cannot be conveniently worked, and in fact cannot be worked at all, without a road thereto, which road must necessarily pass over and across the said mining claim occupied by the defendant, above described, which road must be at least twelve feet in width, and must pass over the said claim occupied by the said defendant, from east to west, the said road being particularly described and marked out on the map hereto attached, marked 'Exhibit A,' and made a part of this petition, the said proposed road being designated on the said map as 'Road No. 1.' 6. That the said

plaintiffs heretofore, on the ninth day of April, 1894, at the city of Anaconda, in the county of Deer Lodge, in the state of Montana, requested of the said defendant that he give them, the said plaintiffs, a road and right of way over and across the said mining claim occupied by him, for the purpose of working the claim of the plaintiffs, and on the said day tendered to the said defendant the sum of one hundred and fifty dollars to cover all damages which he, the said defendant, might suffer by reason of the said road passing over and across the said claim occupied by him, but the said defendant refused to accept the said sum, and refused, and still does refuse, to allow the plaintiffs to pass over the said claim occupied by him, and said right of way has not been, and cannot be, acquired by agreement between the plaintiffs and defendant herein. 7. That unless the plaintiffs are granted a right of way over and across the said claim occupied by the said defendant it will be impossible for them to work the said claim, for the reason that the only accessible route to their said claim is over and across the said claim occupied by the defendant. 8. That the plaintiffs are now working on their said claim, and intend in good faith to work the same. Wherefore, the plaintiffs pray that the court award them a road and right of way over and across the said claim occupied by the defendant, for the purpose of enabling them, the plaintiffs, to work their said claim; that the court appoint three disinterested persons, residents of the said county of Deer Lodge, to assess the damages resulting to the defendant, and the said claim occupied by him, by reason of the said road passing over the said claim, and for such other and further relief as to the court may seem proper.

"GEO. B. WINSTON,
"Attorney for Plaintiffs."

And thereupon presented the same to and prayed the judge of said court to issue a citation to defendant, and otherwise proceed to determine the necessity for, and the damage occasioned by, and award, a right of way on payment of such damage, according to the prayer of said petition, pursuant to the provisions of sections 1495, et seq., division 5 of the Compiled Statutes. That the judge of said court, on consideration of

the petition in connection with the provisions of said statute, and section 15, article III, of the state constitution, declined to proceed in the premises, holding that said statute was abrogated by the provisions of the constitution cited; and that the legislature having since made no provision for opening roads pursuant to the terms of the constitution the court had no jurisdiction to grant the relief prayed for.

On consideration of this question, somewhat prepared for by consideration of other similar, and as serious, questions presented to this court since the inauguration of the state government under the constitution, we reach the conclusion that the view held by the learned judge of the district court should not be sustained. It clearly appears from the provisions made in that regard that it was the policy of both Congress, as manifested in the enabling act, and of the framers of the constitution, to preserve in force the body of the statute law on the various subjects of governmental regulation, enacted through a course of years of territorial existence as statutes of the state, except in so far as those statutes were "modified or changed" by the enabling act, or by the constitution of the state. (See Enabling Act; Const., art. XX, § 1.) We think no fact in the scheme for change from territorial to state government is more plainly manifest than that such was the policy of congress and the constitutional convention. This construction keeps well intact the system of government, and the body of the statutes necessary thereto, until the same are repealed or supplanted by other future enactments; whereas, the other view would wholly sweep away the statute law on any subject wherein the constitution made a change in any respect, and would leave that subject void of legislation until the necessary statute law was supplied by future enactments. Thus, under that view, the grand jury system provided for by the statute, instead of being merely modified by reading into the statute the constitutional provision of "seven" in place of "sixteen," would have wholly disappeared from the statute until replaced by legislative action. (*State* v. *Ah Jim*, 9 Mont. 167; *State* v. *Kenney*, 9 Mont. 228.) This would have been destructive of government, and extremely disastrous to the well-being of the people of this jurisdiction.

Upon the subject immediately under consideration the constitution provides that the question of necessity for, and amount of damages occasioned by, the opening of such road shall be determined by a jury, instead of being determined by the judge and commissioners, as provided by statute. Otherwise the statute provides a method of procedure in such cases not inconsistent with the constitution. It gives jurisdiction to the court, and prescribes a method of procedure, but the constitution modifies this statute by eliminating the commissioners mentioned, and substituting a jury, with power vested in the jury to determine the necessity of the road, and compensation to be awarded if the right of way is granted. By application of the interpretation giving sway to the paramount provisions of the constitution the statute law remains in force, as modified by the constitution, in obedience to the provisions of the act of Congress and the constitution, thus preserving the continuity of a fully developed system of government in passing from territorial existence to statehood. We are clearly of opinion that the court should proceed to administer the law under consideration in conformity with this view.

Ordered that the writ issue, accompanied by a copy of this opinion, with directions to proceed according to the views herein expressed.

All concur.

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CITY OF BOZEMAN, RESPONDENT, v. CADWELL, APPELLANT.

[Submitted October 17, 1893. Decided June 18, 1894.]

CONSTITUTIONAL LAW—*Equal privileges—License tax.*—A city ordinance requiring several classes of professional men to pay a license tax is not unconstitutional, in that such tax is not required of all classes of professional men, where the tax bears equally upon all persons of the classes named.

COMPLAINT—*Sufficiency in prosecution for violation of ordinance.*—A complaint for violation of an ordinance imposing a license tax upon lawyers is not objectionable in that it charges that defendant transacted the business or profession of a lawyer, or in failing to charge that he followed his profession for a compensation, or that he was a lawyer of any pretensions whatever.

Appeal from Ninth Judicial District, Gallatin County.

CONVICTION for violation of a city ordinance. Defendant was tried before ARMSTRONG, J. Affirmed.

E. P. Cadwell, pro se.

The complaint is insufficient in charging that the defendant did transact and engage in the business or profession of a lawyer. The offense is charged in the alternative or disjunctive manner. To say that one transacts and engages in the business of a lawyer is not synonymous with saying that one transacts and engages in the profession of a lawyer. They are not synonymous terms, and not being so, the complaint is bad. (*People* v. *Tomlinson*, 35 Cal. 508; *People* v. *Hood*, 6 Cal. 236; *Commonwealth* v. *Grey*, 2 Gray, 501; 61 Am. Dec. 476; *State* v. *Gary*, 36 N. H. 359; *Noble* v. *State*, 59 Ala. 73.) The complaint is further deficient in that it does not allege that the defendant followed his profession or business for a compensation, i. e., it is not shown by the allegation that he is a professional man, as provided in the ordinance. There is certainly no implication that every lawyer follows his profession for gain. Many are lawyers for the satisfaction of becoming proficient and learned in the law—an accomplishment—a *status* desired—an attainment acquired. And again: "When an act is not in itself necessarily unlawful, but becomes so by the peculiar circumstances and relations, or by a prohibition statute, all the matter must be set forth in which its illegality consists." (*People* v. *Martin*, 52 Cal. 201; *R.* v. *Asrm*, 5 East, 304; *State* v. *Burt*, 25 Vt. 373; *McQuoid* v. *People*, 3 Gilm. 76; *Cantril* v. *People*, 3 Gilm. 356.) The complaint is further insufficient in that it does not state that the defendant was a lawyer, during the time stated, of any pretensions whatever, not even earning thirty dollars a year. Neither does it state when, how, or with whom he practiced as a lawyer. (2 Wharton on Precedents of Indictments, § 804, p. 371; *Commonwealth* v. *Thayer*, 8 Met. 523; *Commonwealth* v. *Stowell*, 9 Met. 569.) The ordinance is unconstitutional in that it only attempts to license a part or portion of the professional men and not all. (Dillon on Municipal Corporations, §§ 256, 259, 322, 325.)

W. F. Davis, for Respondent.

Under a charter authorizing complaint to be made for the violation of ordinances, but not prescribing the mode or requisites, a complaint is not in the nature of an information by a common informer, and the same strictness is not required as in an information or indictment. It is sufficient if it sets out with clearness the offense charged, and the substance of that part of the ordinance which has been violated, with a reference to the title, date, or section. (2 Dillon on Municipal Corporations, § 347. See Comp. Stats. § 407, p. 708; 13 Am. & Eng. Ency. of Law, 518, 521, note 1.) A city may impose a special tax upon lawyers. (*City of Wilmington* v. *Macks*, 86 N. C. 88; 41 Am. Rep. 443; 13 Am. & Eng. Ency. of Law, 538, note 1.) A lawyer is one whose business is to know and practice law. (12 Am. & Eng. Ency. of Law, 964.) A license tax on business callings need not embrace all classes of business. It is essential only that all persons pursuing the same occupation shall be taxed in the same ratio. So a license tax on members of the bar is not open to the objection of inequality because it requires every lawyer to pay the same amount without reference to the amount of his income. (*Robinson* v. *Mayor etc.*, 1 Humph. 156; 34 Am. Dec. 639.)

Per CURIAM.—This is an appeal from a judgment of conviction for practicing law without first having obtained a license. The proceeding was commenced in the police court of the city of Bozeman under the following ordinance of the city: "There shall be levied and collected by the city treasurer and collector from all persons engaged in the kinds of business hereinafter mentioned within the limits of the city of Bozeman a license tax as follows: . . . . 3. From each professional man, before practicing as such. All lawyers, dentists, physicians, surgeons, and all other professions, insurance agents, real estate agents, and notaries public, shall pay a license of one dollar ($1) per quarter. Provided that all persons who draw any legal instruments, deeds, power of attorney or other documents, for which he charges a fee, when the amount of fees for such services amount to thirty dollars ($30) per year, shall be considered a professional man. 4. Any person or persons,

corporation or association who shall transact any business, trade, occupation, or profession, for which a license is required by this ordinance, without first obtaining the same, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten dollars ($10) nor more than one hundred dollars ($100), together with costs of prosecution."

The portion of the complaint charging the offense is in the following language: "That one E. P. Cadwell, from the first day of August, 1892, until the twenty-sixth day of April, 1893, at the city of Bozeman, in the county of Gallatin, state of Montana, and within the corporate limits of said city of Bozeman, did there and then transact and engage in the business or profession of a lawyer without first obtaining a license from said city therefor, and for which professional business a license was and is required by subdivision five of section one of Ordinance No. 86 of said city, entitled 'Concerning Licenses,' and passed August 27, 1891, in violation of section one of Ordinance 86 of said city of Bozeman, entitled 'Concerning Licenses'; wherefore," etc.

The defendant demurred to the complaint, which demurrer was overruled. Upon the trial in the police court the defendant was found guilty. He appealed to the district court. In that court he again urged his demurrer, which was again overruled. On that trial judgment being against defendant, he appeals to this court, and again urges that his demurrer should have been sustained. His contention is that the complaint does not contain facts sufficient.

The appellant's brief has taken a wide range, through which we have followed him, but do not think it necessary to treat all the points *in extenso*. The ordinance under which he was prosecuted was passed in pursuance to a provision of the act of the legislature incorporating the city, which is as follows: "That the city council shall have power to license, tax, and regulate . . . . professional men. . . . . *Provided*, no license shall exceed in amount one-fourth of the license required to be paid by the statute of this state for like business."

Appellant contends that, as the city council had power to license professional men, an ordinance which licensed certain

professional men, and not all, was void and unconstitutional. He contends that to make the ordinance constitutional it should have licensed all professional men—not only lawyers, dentists, physicians, surgeons, etc., but judges, statesmen, college professors, clergymen, etc. But the ordinance is not open to the objection urged, as it bears equally upon all persons of a class. (*In re Dewar's Estate*, 10 Mont. 442.)

Appellant again contends that the complaint is not sufficient in that it charges that the defendant transacted the business or profession of a lawyer. He also contends that the complaint is insufficient in that it does not charge that defendant followed his profession for a compensation, and also that it does not charge that defendant was a lawyer of any pretensions whatever.

We have examined all of the objections urged by appellant to the complaint, and do not consider that any of them are tenable. (Comp. Stats., § 407, p. 708.) The judgment is therefore affirmed.

Affirmed.

All concur.

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KLEINSCHMIDT ET AL., RESPONDENTS, v. GREISER ET AL., APPELLANTS.

[Submitted October 16, 1893. Decided June 25, 1894.]

EQUITY—*Verdict of jury—Judgment.*—In an equity case brought to determine the priority of water-right appropriations the court is not bound, under the provisions of section 250 of the Code of Civil Procedure, to make its decree in conformity with the verdict of the jury. (*Arnold* v. *Sinclair*, 12 Mont. 248, cited.)

WATER RIGHTS—*Abandonment.*—The abandonment by the appropriator of a water right of a ditch through which he formerly diverted the water does not constitute an abandonment of the water right, or any part thereof, where he actually used the water appropriated, but from time to time diverted the same through different ditches.

SAME—*Right of prior appropriator.*—The claim of a prior appropriator of water is not cut down by the claim of a subsequent appropriator to an amount sufficient to irrigate the land which the former actually had under cultivation at the time of the latter's appropriation, but he is entitled to so much of the water originally appropriated as was necessary to irrigate such lands as he then had which were available for the production of crops.

SAME—*Provisions of decree.*—A decree determining the rights of prior and subsequent appropriators of water should provide that each appropriator should have the amount to which he is entitled at the point where his ditch taps the creek.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to determine priority of water rights. The cause was tried before BUCK, J., who rendered a decree for plaintiffs. Reversed.

Shober & Rasch, for Appellants.

I. Appellants insist that by virtue of section 250 of the Code of Civil Procedure, which provides that, "in all cases where there are issues of both law and fact, the issues of law must be first disposed of, and in all cases issues of fact must be tried by a jury (except in actions which involve the settlement of accounts between parties), unless a jury shall be waived by the parties," they had a right to have all issues of fact tried by a jury, and the right thus given by law the courts are bound to respect. The statute in question was incidentally brought before this court as late as 1892 in the case of *Arnold* v. *Sinclair*, 12 Mont. 248. That the appellants had a right to a trial by jury seems hardly to admit of any doubt. Aside from the question as to the force and effect of the finding of a jury upon an issue of fact in an equitable action, the right to such a trial is given and the parties are entitled thereto. The statute is mandatory and leaves no discretion in the judge. The language is peremptory that in all cases, save those specially excepted, issues of fact must be tried by a jury, unless a jury shall be waived by the parties. It is made the duty of the court to grant a jury trial, and, in proportion to the duty of granting it, is the obligation on the judge to be governed by their verdict. (3 Greenleaf on Evidence, § 266.) A trial by jury being secured to all parties litigant as a matter of right in all cases where issues of fact arise, not even a demand for such a trial need be made; and, being a matter of right, the findings of the jury are conclusive. (3 Greenleaf on Evidence, §§ 261–66, 339; Adams' Equity, *376, note; Hayne on New Trial and Appeal, § 234; *Marston* v. *Brackett*, 9 N. H. 336, 349; *Franklin* v. *Greene*, 2 Allen, 522.) It does not seem difficult to ascertain the intention of the legislature. The language of the statute is plain, direct, positive, and unambiguous. It states in concise and unmistakable terms that in all cases,

save in those excepted, issues of fact must be tried by a jury. Statutes should be their own interpreters, and the intention of the legislature, when properly discoverable, should always control the construction of statutes. When the language is plain, simple, direct, and without ambiguity, the act construes itself, and courts must presume the legislature intended what it plainly says. (American Rules, Potter's Dwarris on Statutes, No. 2, p. 143, No. 20, p. 146; *Smith* v. *Williams*, 2 Mont. 195; *Manton* v. *Tyler*, 4 Mont. 366; *Lane* v. *Commissioners etc.*, 6 Mont. 473; *People* v. *Utica Ins. Co.*, 15 Johns. 358; 8 Am. Dec. 243.) But the intention of the legislature becomes apparent when we examine the law in force before the adoption of section 250. Under the law of 1872, which was subsequently, in 1877, changed to its present form, parties litigant were not entitled to a jury trial in an equitable action as a matter of right. The same construction seems to have been placed on the law in force from 1867 up to the time it was changed in the year 1872. This particular section was changed a number of times since 1867, and therefore, the decisions made under the former sections can have no effect under its present form. Neither are the decisions of the supreme court of California at all applicable to the practice of this state, since the statutes are radically different. In California the "advisory theory" is firmly established, and on page 701, paragraph 234, Hayne on New Trial and Appeal, it is laid down that "the same rule has been laid down by the supreme court of the United States with reference to the Practice Act of Montana, which is similar to that of California," citing in support of that conclusion the case of *Basey* v. *Gallagher*, 20 Wall. 670. The same doctrine was enunciated by this court in the year 1885, in the case of *Mantle* v. *Noyes*, 5 Mont. 274, by Wade, C. J., basing his decision upon the same case. (*Basey* v. *Gallagher*, 20 Wall. 670.) Now, it will be perceived that, at the time the case of *Mantle* v. *Noyes*, 5 Mont. 274, was decided, and since the decision in the case of *Basey* v. *Gallagher*, 20 Wall. 670, was made, the statute in question had twice undergone material changes. The law under which the case of *Basey* v. *Gallagher*, 20 Wall. 670, was decided is found in the Code of Civil Procedure adopted in 1867, and reads as follows:

"An issue of fact shall be tried by a jury, unless a jury trial is waived or a reference be ordered as provided in this act. Where there are issues both of law and fact to the same complaint the issues of law shall be first disposed of." (Code Civ. Proc., 1867, § 155.) In 1872 the law was changed as follows: "An issue of law shall be tried by the court, unless it be referred upon consent, as provided in chapter 8 of this title. An issue of fact, in an action at law, shall be tried by a jury, unless a jury be waived, or a reference ordered as provided in this act." (Code Civ. Proc., 1872, § 190.) In 1877 the law was enacted in its present form. "In all cases issues of fact must be tried by a jury." The fact of the radical change of the law since the Basey case was determined does not seem to have been called to the attention of the court when the case of *Mantle* v. *Noyes*, 5 Mont. 274, was decided. To hold, then, that the granting of a jury trial is still in the discretion of the judge would be in effect to hold that the law in force before the enactment of section 250 in 1877 remained unchanged, and the statute to all intents and purposes the same, which is manifestly not the case. By section 250 the legislature intended to give every litigant the right to have issues of fact tried by a jury in all cases, irrespective of the nature of the action, save and except that class of cases by the statute itself specially excluded. If that was not the intention it is altogether too unlikely that any change would have been made in the law then in force. (Sutherland on Statutory Construction, §§ 237, 238; Code Civ. Proc., § 630; Laws of Montana, div. 5, § 204.) But the intention of the legislature most clearly appears from the fact that certain particular cases were specially and expressly excepted from the operation of the new law. The statute provides that in all cases, except in actions for the settlement of accounts, issues of fact must be tried by a jury. It does not say in all cases except in equitable actions as distinguished from legal actions, but it excepts only one class of equitable actions which, in its nature, is peculiar from all others. The expression of one thing is the exclusion of another, and consequently no further exception was intended. (Sutherland on Statutory Construction,

§ 328.) All actions, save those specially excepted, are placed upon the same footing, and courts have no authority to create distinctions not recognized by statute. (*Gagliardo* v. *Hoberlin*, 18 Cal. 396.)

II. There was no abandonment of the water right within the meaning of the law, and no abandonment is proven by the testimony in this case. We must construe the word "abandon" according to its ordinary signification. The word "abandon" means to relinquish, desert, or forsake. There can be no abandonment without some action of the will and an intent to abandon. It would be necessary in order to prove abandonment in this case to show that Greiser gave up all claims to his water right with the intention to not use it again. (*Dodge* v. *Marden*, 7 Or. 457; *Mallett* v. *Uncle Sam G. & S. M. Co.*, 1 Nev. 202; 90 Am. Dec. 484; *Atchison* v. *Peterson*, 1 Mont. 565.) To constitute an abandonment there must be the concurrence of the intention to abandon, and the actual relinquishment of the property, so that it may be appropriated by the next comer. (2 Blackstone's Commentaries, 9; *Judson* v. *Malloy*, 40 Cal. 299.) Any one entitled to divert a quantity of water from a stream may take the same at any point of the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. (*Fuller* v. *Swan River etc. M. Co.*, 12 Col. 12; *Strickler* v. *City of Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245; Angell on Watercourses, § 229; *Kidd* v. *Laird*, 15 Cal. 162; 76 Am. Dec. 472; *Junkans* v. *Bergin*, 67 Cal. 267; Gould on Waters, § 229.) Appropriators of water rights for irrigation purposes, after conducting water to the point of intended use, have a reasonable time in which to apply it to the use intended. They may add to the acreage of cultivated land from year to year, and make application of water thereto for irrigation as necessities demand, or as their abilities permit, until they have put to a beneficial use the entire amount of water at first diverted by them. (*Conant* v. *Jones*, 32 Pac. Rep. (Idaho, Feb. 8, 1893) 250; *White* v. *Todd's etc. W. Co.*, 8 Cal. 443; 68 Am. Dec. 338; *Barnes* v. *Sabron*, 10 Nev. 217; Gould on Waters, § 236.)

Toole & Wallace, for Respondents.

The provisions of the Code of Civil Procedure of this state do not require the court to submit all questions of fact to a jury and follow the verdict in granting or refusing an injunction in a cause in equity. Counsel for appellants have ingeniously arranged the various acts of the legislative assembly upon this subject, and, by means of erroneous premises, presented a very plausible argument in favor of their position. We shall not controvert the position taken by appellants, that if it is made the duty of a court to grant a jury trial in equity cases, that there exists a corresponding obligation to be governed by the verdict it may render. We shall concede that if the right to a jury trial is secured in such cases the findings will be conclusive until set aside in the mode provided by the statute, and that in construing a statute the court will be controlled by the language employed, when plain, certain, and unambiguous, and shall assume that the authorities cited by counsel support these propositions. It will, however, be noted that this is not the only rule of interpretation, and that statutes, like written instruments, where the intention of the lawmakers or parties controls, must be construed in the light of facts and surrounding circumstances as they existed at the time the statute was enacted or the written instrument was executed. To illustrate: If we should find that at the time of the enactment of the section of the statute relied upon the courts were possessed with both legal and equitable jurisdictions and powers, and that, under our system of jurisprudence, the two were united in the same court and that the forms of action alone were abolished, the statute will be presumed to have been enacted with reference to the condition of things, and will be construed accordingly. If, at the time of the adoption of section 23, article III, of the constitution, or the enactment of section 250 of the Code of Civil Procedure, the conscience of the chancellor was to be consulted and satisfied in equity cases, and the verdict of a jury controlled in common-law cases, we should interpret the provisions of the constitution requiring that "the right of trial by jury shall be secured to all and remain inviolate," as well as the section of

the code, which says, "in all cases issues of fact must be tried by a jury" as applying to actions at common law and nothing short of an express provision including cases in equity would justify so radical a change in our jurisprudence, by which the equitable powers of a chancellor were entirely ignored, and all equitable cases by one fell stroke of legislation converted into legal actions. In other words, nothing short of express, certain, and unambiguous language in terms making it applicable to cases in equity would justify the court in assuming that the legislative assembly intended to wipe out all distinction between law and equity, in so far as the distinct powers or functions of the courts are concerned, whether exercised by separate courts in different actions, or one and the same court in the same action. As far as the courts have gone in this direction, as we are advised, where not inhibited by constitutional provisions, is to construe similar codes to that of our own, as prescribing a general form of actions applicable to cases at law and equity blending both in one, but at the same time recognizing the distinctive features of the case as presented by the facts pleaded, and the exercise of the respective powers of the court as the case requires.

In order to render inapplicable the canon of interpretation thus announced, it is claimed that as the exception contained in section 250 refers to certain cases in equity under the maxim "*expressio unius est exclusio alterius*," the manifest intention was to require all questions of fact in equity cases, except those enumerated, to be tried by a jury. There would certainly be much force in this position if the premises, upon which the conclusion is reached, were correct. The language of the statute is "except in actions which involve the settlement of accounts between parties." Contrary to the conclusion reached by counsel for appellants the legislative assembly, in providing for a trial by jury, were met with the embarrassments that arose at an early day in the common-law action of account, purely legal in all its characteristics, but so cumbersome in its nature as to become a proper matter to be referred. Under this view of the question the position that section 250 was intended to apply solely to actions at law, and that the exception was one rendered necessary in such actions on account

of the great number of items, *pro* and *con*, the exception tends to support the position of respondents, rather than that of appellants. Indeed, all that can be said is that actions involving the settlement of account between parties being an action at law and so regarded by the legislative assembly, and yet involving so many items of debit and credit, as to authorize a reference and dispense with a jury, the court might in its discretion so direct, upon the principle that courts of equity in some instances took cognizance of such actions for the same reasons.

Lord Ridsdale, in *O'Connor* v. *Spraigt*, 1 Schoales & L. 305, says: "The grounds on which I think this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all necessary accuracy. . . . : This is a principle on which courts of equity constantly by taking cognizance of matters which, though cognizable at law, are yet so involved with a complex account that it cannot be properly taken at law." Hence, it was that the legislative assembly, by section 250, dealing with matters cognizable at law, ran upon a class of cases which, under certain circumstances, could be better determined without than with a jury, made them an exception. The principles announced will also be found in Snell's Principles of Equity, American Notes, Lawson, pages 427 to 442. Indeed, the rule is a familiar one that the settlement of mutual accounts between parties in the courts constitutes an action at law, unless they involve the transactions of agents, partners, or others sustaining a fiduciary relation. In the first instance the court would have to judge whether or not the case was one so complex as to render it proper to dispense with a jury, and our statute was made to meet the emergency.

The case involving the exception mentioned in the statute is in mining parlance a kind of *pseudo-morph*, which lies so near the contact between the granite and shales, as to partake of the nature of both, but cannot properly be classed with either, and the expert casts it with the one or the other, whichever, in his judgment, predominates in its composition. So it is with the settlement of accounts which lies on the border

line between law and equity, sometimes possessing complications more appropriate for a referee than a jury, yet wanting in those essential elements of trust, agency and the like, so as to entitle it to a fair recognition from either, it has for a long time been subjected to the discretion of the court and tried by a jury or referee, as the court may direct, and this is precisely the situation the statute intends to provide for. Being of common-law origin, and yet possessing elements, in many instances, which would render a jury trial impracticable and embarrassing, to avoid an abatement of the action, in those jurisdictions where law and equity are not blended, many states enacted a similar statute to meet the views thus entertained by the courts. Under this condition of things the exception certainly affords no argument in favor of the position of appellant.

Again, it is claimed by appellants that as the section of the Code of Civil Procedure, applicable to trial of issues of fact, had been materially changed since the enactment of section 155, in 1867, under which it is asserted that this case should have been tried, and it is urged that as section 190, passed in 1872, contained a clause limiting the trial of issues of fact to a jury, to "an action at law," and as section 250, passed in 1877, leaves out this limitation, that the intention is obvious to make it applicable not only to actions at law, but also suits in equity. But it will be seen that section 155, passed in 1867, had received a construction limiting the trial of issues of fact by a jury to actions at law without the insertion of the words "in an action at law." It therefore has the same meaning with or without such limitations being expressed upon the principles of interpretation announced in the former part of this argument. The argument is, therefore, that by returning again to substantially the same phraseology used in section 155, by the enactment of section 250, the legislative assembly intended to adopt the interpretation given it by the courts, rather than one it had never theretofore received. Indeed, the conclusion is irresistible that the legislative assembly, knowing that the courts had already construed a section of the statute, general in its terms, to apply only to actions at law, as if though the same were therein expressed, if it had intended by the enactment of section 250 to dispense with this

limitation, it would in plain, certain, and unambiguous terms have declared that a trial by jury should be had both in an action at law or cause in equity. Not having done this the legislative assembly must have intended to adopt the interpretation given to section 155, Laws of 1867, and will be presumed to have left out the words "in actions at law," as superfluous under the decisions of the courts of Montana, and especially that of *Basey* v. *Gallagher*, affirmed by the supreme court of the United States, 20 Wall. 679–81, to which we invite special consideration. It follows from the opinion that if section 155 or 250, *supra*, are to be given the construction contended for by appellants, they were in violation of the organic act, and never became a law in so far as they applied to cases in equity, were never in force in the territory, and consequently not adopted by the constitution of the state. This question has been decided by this court in *Arnold* v. *Sinclair*, 12 Mont. 276, and we should have contented ourselves by a reference to it had not the applicability and reasoning of the court been questioned by counsel for appellants.

Per CURIAM.—The purpose of this action is to adjudicate and determine a controversy between plaintiffs and defendants regarding their priority of right, by appropriation, to use the waters of Prickly Pear creek and its tributary, Cañon creek, situate in Lewis and Clarke county, for irrigation of agricultural lands adjacent thereto.

Plaintiffs allege appropriation about November 11, 1882, of four thousand inches of water from Cañon creek, a tributary of Prickly Pear creek, diverted by means of a dam and ditch, whereby that quantity of said water is conveyed to the lands of divers persons, who own said dam and ditch in common; that such appropriation on the part of plaintiffs is prior to defendants' appropriation of the waters of said creek; that defendants have wrongfully interfered with and removed said dam, thereby preventing plaintiffs' diversion of the waters from said creek, and threaten to continue so to do, thus depriving plaintiffs of the use and enjoyment of their alleged prior right to the use of said waters. Wherefore, they seek judgment establishing their alleged right as prior to that of defendants,

with permanent injunction forbidding defendants' interference therewith.

Defendants, by answer, allege appropriation and diversion of diverse quantities of the waters of Prickly Pear creek by them, respectively, or their predecessors, aggregating nineteen hundred inches, according to statutory measurement, all of which appropriations on the part of defendants are alleged as of dates several years prior to the appropriation by plaintiffs. Defendants also allege that their several appropriations were and are necessary for the irrigation of the agricultural lands owned by them, respectively. The jury sitting in the trial appear to have returned findings satisfactory to defendants, awarding them, severally, about the amount of water claimed prior to plaintiffs' appropriation; but the court modified the findings of the jury, and supplemented the same by some further findings, whereby the quantity of water found by the jury to have been appropriated by defendants, prior to the appropriation by plaintiffs, was diminished to three hundred and twenty inches, distributed among them as follows: Greiser, sixty inches by appropriation of 1871; Leedy, forty inches by appropriation of 1871, and forty inches by appropriation in 1868; Kenck, Duffy, and Coppler, jointly, one hundred and eighty inches by appropriation March 1, 1882. Following those appropriations, in order of time, the court found plaintiffs appropriated seventeen hundred and sixty inches of water of said creek, necessary for their use in the irrigation of their agricultural lands. There were some further appropriations found in favor of defendants, but of dates subsequent to the appropriation by plaintiffs. Decree was entered accordingly. Defendants appeal, insisting that the court erred in several points specified, all of which have been carefully considered in the light of the record.

The first proposition urged by appellants is that, notwithstanding this case is properly classified as in the nature of an action in equity, the court is bound, by virtue of the peculiar provisions of section 250 of the Code of Civil Procedure, to make its decree in conformity with the verdict of the jury. This proposition has been several times argued to this court, and given due consideration, resulting on each occasion in the

conclusion, remarked in *Arnold* v. *Sinclair*, 12 Mont. 248, that it will not be presumed, from any devious or uncertain language, that the legislature undertook to prune away one of the most distinctive and important jurisdictional functions of the equity court; and when a statute is found clearly expressing that intention, it will be time enough to inquire as to whether the legislature possessed power to that end.

Passing to a consideration of the points of error specified in relation to the findings of fact, we find that the record, which purports to contain a transcript of all the evidence introduced, does not disclose evidence sufficient to support the finding by the court that defendant Greiser abandoned, in the year 1877, all but sixty inches of his original appropriation of the waters of said creek. According to the evidence shown by the record defendant Greiser constantly used the waters appropriated for his ranch, but from time to time diverted the same through different ditches, and in 1877 he abandoned an older ditch formerly used for the same purpose. This does not constitute abandonment of his water right, or any part thereof, nor does any evidence in the record support such finding. Nor is there evidence in the record sufficient to warrant the finding by the court to the effect that defendants Duffy and Coppler did not acquire an interest in the Tierney ditch until May, 1885. The undisputed evidence, as disclosed by the record, shows that they acquired an interest in said Tierney ditch in June, 1882, and that testimony is corroborated by the joint notice of appropriation of the waters of said creek by Tierney, Duffy, and Coppler, introduced in evidence, which bears date May 25, 1882, and declares their appropriation as of that date. Nor is there evidence in the record sufficient to warrant the finding that, after Duffy and Coppler acquired interests in said Tierney ditch, they enlarged the same to a capacity sufficient to divert the water by them appropriated. The testimony of witnesses on this point is emphatically to the contrary effect, except that of witness Ford, who, under contract, for the owners, continued the excavation of said ditch after Duffy and Coppler acquired interests therein. In his testimony he describes his work upon said ditch, and says that he enlarged or widened the excavation of a portion of the ditch, where the work of

Tierney in the excavation thereof was left off; that Tierney directed Ford to widen the ditch in that part, explaining that the last of his excavation was done in the winter, and was not made of sufficient width at that part. But Ford distinctly testifies that it was only the portion of the excavation towards the end, where Tierney left off, that he enlarged. His testimony, under such explanation, becomes consistent with that of other witnesses on this point, all of which is insufficient to support the finding that the part of said ditch already excavated by Tierney was enlarged after Duffy and Coppler acquired interests therein. The effect of the finding by the court on this point would place the appropriation of Duffy and Coppler as of May, 1883, subsequent to that of plaintiffs.

There is another finding by the court to the effect that only a portion of certain ranches owned by defendants were available for irrigation, and apparently upon that theory the quantity of water allotted to them by the findings of the court was very considerably diminished from the amount appropriated and diverted through their ditches, and claimed to be necessary to irrigate their lands. It is always proper to inquire into the question of the necessity and ability to use the quantity of water appropriated and diverted. If it should appear from proper evidence that a portion of defendants' lands are so situate that the water claimed by such defendants could not be diverted thereto, or that the land is of such character or condition as that crops of grass, grain, or vegetables could not be grown thereon with the aid of irrigation, it would seem proper to take such conditions into consideration, in determining the amount of water to which such defendants were entitled. But the evidence in this case does not warrant the finding that only the portions of the lands owned by defendants, as designated by the court, were "available for irrigation." It does not appear from the evidence that there was contention by the litigants that certain portions of the ranches of defendants were of such character, or so situate, as not to be available for irrigation.

There was much evidence introduced on the question as to the quantity of water necessary, per acre, to irrigate certain lands owned by defendants, and how the quantity varied when

applied to different characters of soil. There was also considerable evidence introduced on the inquiry as to how much land defendants had under cultivation at the date of plaintiff's appropriation out of the waters of said creek, in the fall of 1882; and some findings by the court tend to indicate that it proceeded, in determining the quantity of water to which defendants were entitled prior to plaintiffs' appropriation, on the theory that defendants were entitled to hold, prior to plaintiffs' appropriation, only a sufficient quantity to irrigate the lands which defendants actually had under cultivation at the date plaintiffs initiated their appropriation. It is not shown with clearness and certainty that the court proceeded on such theory, but certain findings by the court, stating particularly that the defendants named had under cultivation at the date of plaintiffs' appropriation a stated acreage of land, tend to indicate that the court proceeded on the theory that defendants' appropriation of water prior to plaintiffs' should be cut down to a quantity sufficient to irrigate the land of defendants actually cultivated at that time. Such theory, if followed, is, we think, without doubt, erroneous. Thereby a prior appropriator of water would be cut down to the quantity necessary to irrigate the land he actually had under cultivation when the subsequent appropriation was made, although the first appropriator's land was all available for production of crops by aid of irrigation, but, at the time of making the appropriation of water necessary for its irrigation, he had not subdued all of it to the plow. The priority under such rule would depend largely upon the time appropriators brought their lands under cultivation, and not upon the priority of appropriation and diversion of the water necessary to irrigate the land owned by the appropriator, as the law provides.

A further objection urged by appellants is that the decree maintaining the dam against defendants' interference would, in certain seasons, in effect, withhold all the water of said creek from appellants—even that awarded them by the decree prior to the appropriation of plaintiffs. Respondents answer this objection by admitting that the intention of the decree was to have the dam so constructed and operated as to allow the volume of water awarded defendants prior to the right of

plaintiffs to pass it at all times, if so much water flowed in the creek, and concede that if the decree is not thus conditioned it may be modified to that effect.

Appellants also urge that the decree does not provide at what point they may take the water awarded to them in several amounts. It appears to be agreed that the appropriator of water should have the amount to which he is entitled at the place where his ditch taps the creek, and appellants concede that if the decree in this case does not provide that respondents shall allow sufficient water to flow past their dam to give the appellants, at the points where their several ditches tap said creek, the amount of water awarded them, the decree may be modified to so provide. In our opinion that would be a proper provision, and the decree should be conditioned accordingly.

For the reasons above set forth the judgment entered ought to be reversed, and the case remanded to the trial court for revised findings in conformity with the views herein expressed, upon the evidence already before the court, supplemented by such other evidence as may be necessary to ascertain and determine the respective rights involved. The order of this court will be enter accordingly.

Reversed.

HARWOOD and DE WITT, JJ., concur.

SWEETZER, RESPONDENT, v. DIEHL ET AL., APPELLANTS.

[Submitted October 30, 1893. Decided July 2, 1894.]

PLEADING—*Vendor and vendee—Fraud—Mortgages—Deficiency judgment.*—An answer by the vendee of mortgaged premises to an action to foreclose the mortgage and to obtain a deficiency judgment against him, under a clause in the deed providing for the assumption of the mortgage debt, which avers that such clause was fraudulently inserted, and that defendant's agent had no authority to accept a deed containing such a provision, states a good defense, without alleging the tender of a deed back to his grantor upon discovery of the fraud.

Appeal from First Judicial District, Lewis and Clarke County.

FORECLOSURE. Demurrer to answer of defendant Mantle was sustained by BUCK, J. Reversed.

Statement of the case by the court:

The sole question involved in this appeal is whether the allegations of the separate answer on the part of the defendant Mantle are sufficient to constitute a defense. The object of the action is to enforce payment of a promissory note for thirteen hundred dollars, and foreclosure of a mortgage executed by defendant George B. Diehl, and Hannah, his wife, on certain real property in the city of Helena, to secure payment of the same, and for a deficiency judgment against Mantle, the grantee of the mortgaged premises, subsequent to the execution of said mortgage, as well as the other defendants, for any portion of said debt remaining unpaid after application of the proceeds of the sale of said mortgaged property. It appears that, after making said mortgage, Diehl and wife conveyed said premises to defendant Mantle, and it is alleged by plaintiff that in said conveyance, as one of the conditions of the purchase by Mantle, he assumed and agreed to pay said note; and, by virtue of that assumption, plaintiff demands a deficiency judgment against Mantle for any deficiency remaining after the application of the proceeds arising from the sale of the mortgaged premises. In this action Diehl and wife are in default. Mantle filed his separate answer, wherein he denies, on several grounds, personal liability for payment of said note, or any part thereof remaining unpaid after application of the proceeds from the sale of the mortgaged premises. Demurrer to his separate answer was sustained by the court, and defendant Mantle appealed.

The answer of Mantle, which was rejected on demurrer as insufficient, reads (omitting formal allegations) as follows:

"Admits that on or about the sixteenth day of April, 1890, for a valuable consideration and by regular deed of conveyance, the said George B. Diehl and wife sold, granted, and conveyed the premises described in plaintiff's complaint to this defendant, subject to plaintiff's mortgage; but defendant denies that he covenanted with and promised the said George B. Diehl, except as hereinafter set forth, as part or for any consideration therefor, that he, the said Mantle, would assume and pay the plaintiff's said mortgage. Admits that the deed executed by the said George B. Diehl and wife to him contained the follow-

ing clause, to wit: 'Subject to a mortgage of thirteen hundred (1,300) dollars made by the parties of the first part to M. Bolles & Co., of Boston, bearing interest at eight per cent, payable half-yearly, which mortgage, together with the interest thereon, the party of the second part hereby assumes and agrees to pay, according to the tenor thereof,' but alleges that, at the time of the execution of said deed, and the acceptance thereof by him, it was without the knowledge on his part that the said deed contained the said clause, and that he had no knowledge of the fact that the said deed did contain said clause until this action was brought; that, at the time of the execution of the said deed, one Charles Jeffreys was the agent of the said defendant Mantle, and acted for the said Mantle in the purchase of the said property; that the only authority given by the said Mantle to the said Jeffreys for the purchase of the said property was to purchase the said property from the said George B. Diehl, subject to plaintiff's mortgage; that the said agent, Charles Jeffreys, had no authority to bind the said defendant, in assuming and agreeing to pay the said mortgage; and that the said Charles Jeffreys, in accepting a deed containing a clause hereinbefore set forth, acted without authority and without defendant's knowledge. Defendant denies that, in part of any consideration for the conveyance of said property, he promised the said George B. Diehl, that he, the said Mantle, would assume and pay the plaintiff's said mortgage. Denies that he accepted the deed of conveyance, and denies that at his instance and request the same was recorded on the nineteenth day of April, 1890, in book 23 of deeds, page 342; but, on the contrary thereof, defendant alleges that he has never seen the said deed, or accepted the same, and that the same was received by his said agent, Charles Jeffreys, as hereinbefore set forth, and who recorded the same without the knowledge, consent, or authority of the said defendant. Defendant denies that he is now the owner of the said property. For further answer, defendant alleges that, at the time of the execution of the said deed, it was fully understood and agreed upon by and between the said George B. Diehl and Hannah Diehl and the said Charles Jeffreys, as agent of the defendant, that the same deed should be made subject to the

mortgage of thirteen hundred (1,300) dollars existing on said premises, and that the said property should be taken subject to the said mortgage; and defendant alleges that through fraud, imposition, and deceit of said George B. Diehl, a clause was inserted in said deed, as set forth in plaintiff's complaint, the said George B. Diehl thereby fraudulently seeking to bind said defendant to assume and agree to pay the said mortgage, but that the said mortgage was not assented to by the said Charles Jeffreys, as agent of the said defendant, and the said deed was accepted by the said Jeffreys without knowledge of the fact that the said clause existed therein."

The statute of frauds was also set up in the answer of Mantle as further defense, but no point is made on this appeal respecting that plea. The demurrer to the answer of Mantle states two grounds of objection to that portion of the answer here under consideration: 1. That the facts therein set forth are not sufficient to constitute a defense; 2. That the answer is uncertain and ambiguous.

Corbett & Wellcome, for Appellant.

The court erred in sustaining the demurrer of the plaintiff to the answer of the defendant Lee Mantle, for the reasons following: 1. That the answer states that defendant had no knowledge that the deed mentioned in plaintiff's complaint contained a clause binding this appellant to assume and pay the said mortgage, and where, under such circumstances, a clause to such effect is contained in a deed, the same is not binding upon the grantee where he repudiates the deed as soon as he learns of the existence of the clause. (2 Devlin on Deeds, § 1077; *Stevens Institute of Technology* v. *Sheridan*, 30 N. J. Eq. 23; *Cordts* v. *Hargrave*, 29 N. J. Eq. 446; *Culver* v. *Badger*, 29 N. J. Eq. 74.) 2. The acceptance by an agent of a deed containing a clause binding a principal to pay an existing mortgage upon the premises conveyed does not bind the principal, if the agent is without authority. (2 Devlin on Deeds, § 1076; *Fairchild* v. *Lynch*, 42 N. Y. Sup. Ct. 265.) And in the answer of the said defendant it appears that at the time of the execution of the deed and its alleged acceptance the transaction was had through the agent of the defendant,

and that said agent had no authority to purchase said property and to bind the defendant Lee Mantle to pay the outstanding mortgage. 3. The defendant Lee Mantle had the right to defend in the action, and to have the question of the acceptance of the deed by himself and the question of fraud in the insertion of the disputed clause in the deed determined in this action. And the defendant Mantle had a right to have these matters determined upon a showing of an equitable defense to the court, notwithstanding the legal character of the action against him. Equitable defenses may be set up in an action of a legal nature. (*Crary* v. *Goodman*, 12 N. Y. 266; 64 Am. Dec. 506; *Carpentier* v. *City of Oakland*, 30 Cal. 439; *Jackson* v. *Lodge*, 36 Cal. 55; *Bruck* v. *Tucker*, 42 Cal. 346.) It is the duty of the trial court first to try and decide upon the equitable defense before proceeding with the action at law. (*Martin* v. *Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365.) The demurrer sets up in its second statement that the answer is uncertain and ambiguous. Such is not admitted; but, if it be true, the plaintiff cannot disregard any proper defense set up in the answer, though other defenses inconsistent therewith be pleaded. (*Bell* v. *Brown*, 22 Cal. 671; *Buhne* v. *Corbett*, 43 Cal. 264.)

Leslie & Craven, for Respondent.

The demurrer to the answer was properly sustained upon the ground that the facts stated were not sufficient to constitute a defense. It is a familiar principle of pleading, where an equitable defense is allowed in an action at law, that the defendant must plead the facts constituting such defense as fully as he would be required to do, were he to come into court as plaintiff asking for the same or other similar relief. The cases cited by appellant in the 30 and 42 California illustrate and affirm that principle. Had appellant brought a suit in equity, alleging that plaintiff was threatening a foreclosure, and asking for a reformation or rescission of the deed, equity would have compelled him to make Diehl a party defendant as well as plaintiff herein. His answer, therefore, in this cause should have been not only an answer as to plaintiff, but also a pleading in the nature of a cross-complaint as against

his codefendant Diehl. This was not done or attempted. And can it be contended that the averments as to *ultra vires* in the conduct of the agent, or as to fraud, as set forth in the answer herein, would have any standing in a suit brought by defendant for reformation or rescission of the deed? His averments as to fraud are all conclusions of law. No acts, representations, or conduct on the part of Diehl resulting in the insertion of the assuming clause in the deed, and showing in what the fraud consisted, are alleged. No circumstances surrounding the execution of the deed are alleged. The averment that at the time of the execution of the deed it was understood that the same should be made subject to the mortgage, is not incompatible with the further agreement that the grantee at said time further assumed and agreed to pay the mortgage indebtedness. The defendant seeks neither to reform nor to rescind. After acknowledging that the deed was executed to him, accepted by him, and placed on record; after acknowledging, by failing to deny, that he was the owner of the property from date of record until he verifies his answer, he seeks merely to be relieved from the liabilities of the contract, and yet retain the property or its proceeds. He must either affirm the act of his agent in toto, or repudiate it in toto. If he repudiates the deed because of unwarranted assumption of authority on the part of the agent, he must come into court with an offer to restore Diehl to his original *status*, either by proffer of reconveyance, or by offer to account for and pay over the proceeds if he has sold the property to third parties. In administering remedies by reforming or rescinding contracts, the fundamental theory is restoration. (Pomeroy's Equity Jurisprudence, § 910.)

Per CURIAM.—The ground upon which it is urged that this answer is insufficient in substance to constitute a defense is that if defendant Mantle sought to avoid the condition obliging him to personally assume and pay said debt inserted in said conveyance, on the ground that such condition was inserted by Diehl "through fraud, imposition, and deceit," and the deed containing the same was received by his agent without authority, then defendant should, on discovery of the

alleged fraud, have tendered a deed of the land back to Diehl; that Mantle cannot rescind or cancel part of the transaction whereby he took conveyance of said land—namely, the provision in the conveyance obliging him to personally pay said mortgage debt—without a restoration of the property to Diehl and wife; and that this should have been offered and set up in the answer of Mantle.

The court is of opinion that this objection cannot be maintained. Mantle acknowledges that he purchased said land from Diehl and wife subject to said mortgage thereon, but without any agreement to personally assume or pay the mortgage debt. Even if Mantle can avoid the alleged assumption or promise to pay said debt on the ground that he never assumed or authorized any one on his behalf to assume said debt, and that the provision for his assumption thereof was fraudulently inserted in said conveyance, this would not enable him to revoke the entire contract whereby he purchased said land. He would be bound in the transaction for the purchase, and could not throw back the land on the hands of Diehl, and recover the consideration which he paid therefor from Diehl, because there is no ground for that; but he resists the alleged agreement to personally assume and pay the mortgage debt, for the reasons above stated and set out in his answer.

That part of the transaction whereby Mantle purchased said property he does not seek to avoid, nor does he allege any cause therefor. But it does not follow that he cannot defend against the imposition of a condition upon him, which, according to the allegations of his answer, he never agreed to, and never authorized any agent to contract on his behalf, but which was fraudulently inserted in the transaction, by repudiating such alleged obligation as soon as discovered. If Mantle ought to tender back the premises to Diehl, then he ought to be allowed to recover the amount paid in the purchase of said property, but he could not recover the same because he authorized the purchase. He admits and appears to be willing to abide by the transaction, so far as he entered into it, or authorized it to be entered into on his behalf; but he seeks to defend against the imposition of the obligation upon him which he never entered into or authorized, according to his pleading.

Manifestly the objection of plaintiff in this respect is based upon a ground in no manner affecting his rights. What does it either advantage or injure plaintiff that Mantle shall or shall not tender conveyance of the mortgaged premises back to Diehl? This point, if tenable at all, would properly be raised or waived by Diehl himself, but he does not appear at all in this action. No doubt it would be inequitable to put upon Diehl a deficiency judgment for said mortgage debt, or any part thereof, without giving him the right to become purchaser of the mortgaged premises on payment of the mortgage debt, because Mantle took the premises in question "subject to the mortgage"; but the law provides such right in favor of Diehl, without canceling the sale of the premises from Diehl to Mantle, as to which sale there is no question of fraud or deceit, or want of authority on the part of Mantle's agent, alleged.

That there is no force in the proposition that his answer fails to state a substantial defense, because defendant Mantle has neglected to tender back the premises in question to his grantor Diehl, is shown by the situation of these parties to the litigation. The premises in question are beholden for the mortgage debt, and must go to satisfy the same. This is conceded by all. Therefore, if Mantle retains the property which he purchased, and had conveyed to him subject to the mortgage, he would be obliged to pay the mortgage debt in full; and that, of course, would relieve Diehl from the obligation thereof. But if Mantle does not see fit to relieve the property from the encumbrance by payment of the mortgage debt, the premises will be sold for such price as they will bring; and the deficiency judgment would, if Mantle has not assumed the same, fall upon Diehl alone, and the property would go to whosoever purchased it. Now, Diehl, in order to make the property pay the encumbrance, and avoid a deficiency judgment against himself, is at liberty to see that the property is sold for sufficient to pay off said debt, and thereby compel Mantle, if he keeps the same, to pay the debt, and relieve Diehl therefrom, or Diehl may become the purchaser, and take the property, if he is compelled to pay the debt or any part thereof.

It is therefore manifest, considering the provisions of the law and the position of the respective parties, that there is no necessity to cancel the sale of said property from Diehl to Mantle, which undoubtedly rests upon other considerations, in order to give the party paying the mortgage debt the right to take the property. The objection that the answer is uncertain and ambiguous, we think, is not well taken. Exceptions sustained. Judgment reversed. Case remanded for further proceedings.

Reversed.

HARWOOD and DE WITT, JJ., concur.

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JOHNSON, RESPONDENT, v. BIELENBERG ET AL., APPELLANTS.

[Submitted March 27, 1893. Decided July 2, 1894.]

WATER RIGHTS—*Judgment—Findings.*—In an action to determine priority of water rights findings that a defendant became entitled to his right by an appropriation at a given date, that plaintiff had obtained a right to a less amount of water by a later appropriation, and that plaintiff had held the amount of such appropriation through adverse possession as against defendant, are inconsistent, and will not support a judgment awarding plaintiff the amount of his later appropriation.

Appeal from Fourth Judicial District, Missoula County.

ACTION to determine priority of water rights. The cause was tried before DURFEE, J. Remanded for further findings and modification of judgment.

Robinson & Stapleton, for Appellant.

F. W. Cole, and *H. R. Whitehill*, for Respondent.

Per CURIAM.—Peter Johnson commenced this action against twenty-one defendants, to determine the rights and priorities of himself and said defendants in the waters of Dempsey creek, for the purpose of irrigating agricultural lands. Upon the trial the court found all of their rights, and classified the same, and entered judgment accordingly. Herman Johnson, a defendant, appeals, being dissatisfied with the disposition of a

certain one hundred inches of water, as between himself, on the one side, and Peter Johnson and Patrick Quinlan on the other. The court found that Herman Johnson duly appropriated one hundred and fifty inches in 1866. There is no complaint of this finding. The court then found that Peter Johnson and Patrick Quinlan had, since 1867, held and used adversely to all the world one hundred of these inches; but the court also found that Peter Johnson and Patrick Quinlan had obtained this one hundred inches, and owned it by reason of appropriation of the same from the waters of said creek in 1867. With these two findings made, the court, in its judgment, gave this one hundred inches to Peter Johnson and Patrick Quinlan. Herman Johnson now complains that the judgment as to this one hundred inches is not supported by the findings.

The difficulty as to this one hundred inches of water is that the findings of the court in respect thereto are apparently wholly inconsistent. The court finds that Johnson and Quinlan appropriated this one hundred inches of water from the waters of the creek, and then it finds that they got it from Herman Johnson's water by adverse possession. If they obtained their title by the means described in one finding they did not obtain it in the manner set out in the other finding. If Johnson and Quinlan had held this water by adverse possession against Herman Johnson for the period of the statute of limitations the judgment is supported by the finding which was made to that effect. If the title of Johnson and Quinlan was by the appropriation in 1867 of this one hundred inches, then the judgment is not supported by the finding which was made to that effect, because the court also found that the appropriation by Herman Johnson was a year earlier. It is not for us to determine which finding is true, whether they got their water by adverse possession against Herman Johnson, or whether they attempted to appropriate it from the waters of the creek.

The case is therefore remanded, and the district court is directed to take testimony, make findings, and render judgment upon this point only; that is to say, as between Herman Johnson, on the one side, and Peter Johnson and Patrick Quinlan, on the other, let it be determined who is entitled to the one

hundred inches of water out of the one hundred and fifty inches appropriated by Herman Johnson in 1866, over and above the fifty inches already found by the court to belong to Herman Johnson, in the sixth class of priorities.

Appellant also calls attention to the fact that Peter Johnson and Patrick Quinlan are awarded one hundred and three inches each, in the fifth class of priorities, when in fact they claimed in their pleadings only one hundred inches. Respondent says that this is a clerical error, and concedes that it should be corrected, as demanded. Let such modification therefore be made, on *remittitur* being filed below.

Remanded.

All concur.

GALVIN, RESPONDENT, v. MAC MINING AND MILLING COMPANY, APPELLANT.

[Submitted November 9, 1893. Decided July 2, 1894.]

PROMISSORY NOTE—*Attorneys' fees.*—Attorneys' fees provided for in a promissory note in case its payment be enforced by an action at law are not recoverable in an action by the maker to compel payment of the amount of the note by one who had assumed and agreed to pay it, and who did pay it after the commencement of such suit.

ASSUMPSIT—*Pleading and proof—Variance.*—A verdict for plaintiff for the value of certain shares of stock alleged to have been sold and delivered to the defendant company is supported by evidence that plaintiff indorsed on the stock certificates an assignment thereof to a third party from whom he was about to obtain a loan upon the stock as security, leaving the same with defendant's secretary; that the loan was not consummated, and plaintiff, upon demanding the certificates, was told by the secretary that he would issue a new certificate in a few days; that, upon again applying, the secretary said, "You have no stock in this company," the defense being based upon the theory that the secretary was justified in withholding the certificates until reassigned by the indorsee or their delivery ordered.

SAME—*Same—Tortious detention of goods.*—A complaint in *assumpsit* upon a contract of sale and purchase in which the reasonable value of the property is sought to be recovered is supported by proof of a tortious assumption, detention, and unwarranted refusal to deliver the property to plaintiff on his demand therefor; but where the action is to recover for money had and received to the plaintiff's use by the wrongful taker, through a sale of the property, the sale and the amount received should be alleged and proved.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to recover the value of stock sold to defendant, and to recover the amount of plaintiff's note which defendant

had assumed and agreed to pay. The cause was tried before HUNT, J. Plaintiff had judgment below. Affirmed.

McConnell, Clayberg & Gunn, for Appellants.

I. The first question presented for the consideration of the court is, Are the allegations of the complaint, upon which the first cause of action is based, supported by the evidence? In considering this question it is necessary to inquire under what circumstances a party can waive the tort and sue in *assumpsit*, where property has been converted. We submit that the great weight of authority in this country and in England is in favor of the rule that a party cannot waive the tort and sue in *assumpsit*, unless the wrongdoer has sold or disposed of the property converted, and received money or money's worth therefor; and that this rule is based upon reason and principle. In support of the proposition just stated, see the following authorities: *Watson* v. *Stever*, 25 Mich. 386; *Moses* v. *Arnold*, 43 Iowa, 187; 22 Am. Rep. 239; *Jones* v. *Hoar*, 5 Pick. 285, and extended note; *Webster* v. *Drinkwater*, 5 Me. 319; 17 Am. Dec. 238, and note; *Tuttle* v. *Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; *Saville* v. *Welch*, 58 Vt. 683; *Johnston* v. *Salisbury*, 61 Ill. 316; *Stearns* v. *Dillingham*, 22 Vt. 624; 54 Am. Dec. 88; *O'Conley* v. *City of Natchez*, 1 Smedes & M. 31; 40 Am. Dec. 87, and note; *Balch* v. *Patten*, 45 Me. 41; 71 Am. Dec. 526; *Kidney* v. *Persons*, 41 Vt. 386; 98 Am. Dec. 595; *Randolph Iron Co.* v. *Elliott*, 34 N. J. L. 184; *Hutton* v. *Wetherald*, 5 Harr. (Del.) 38; *Pike* v. *Bright*, 29 Ala. 332; *Bartlett* v. *Tucker*, 104 Mass. 336; 6 Am. Rep. 240; *Fuller* v. *Duren*, 36 Ala. 73; 76 Am. Dec. 318; *Gilmore* v. *Wilbur*, 12 Pick. 120; 22 Am. Dec. 410; *Creel* v. *Kirkham*, 47 Ill. 344; *Budd* v. *Hiler*, 27 N. J. L. 43; *Smith* v. *Hatch*, 46 N. H. 146; *Pearsoll* v. *Chapin*, 44 Pa. St. 9; *Guthrie* v. *Wickliffe*, 1 A. K. Marsh. 83; *Sanders* v. *Hamilton*, 3 Dana, 552; *Lawson's Exrs.* v. *Lawson*, 16 Gratt. 230; 80 Am. Dec. 702; *Willet* v. *Willet*, 3 Watts, 277; *Osborne* v. *Bell*, 5 Denio, 370; 49 Am. Dec. 275; *Barlow* v. *Stalworth*, 27 Ga. 517; *Tucker* v. *Jewett*, 32 Conn. 563; *Elliott* v. *Jackson*, 3 Wis. 649; *Chamblee* v. *McKenzie*, 31 Ark. 155; *Jones* v. *Baird*, 7 Jones, 152; Bishop on Contracts, 186, and cases cited;

Chitty on Contracts, 905–06.) There are cases which hold that the tort may be waived and *assumpsit* maintained whenever the property has been converted either into money or into any other beneficial use by the wrongdoer, and especially where it has been so applied to his use as to lose its identity. (*Evans* v. *Miller*, 58 Miss. 120; 38 Am. Rep. 313; Cooley on Torts, 95; 2 Greenleaf on Evidence, § 108.) We have been unable, after an extended investigation of the subject, to find a single case where the facts are analagous to those of the case at bar, in which the court has held that the tort may be waived, and an action of *assumpsit* maintained. In some of the decisions general expressions may be found which, if taken without reference to the particular case in which they are used, would be in conflict with the rule established by the cases just cited. And there is a class of cases in which a party is allowed to waive the tort and sue in *assumpsit*, even though the property has not been disposed of or used by the wrongdoer. The class we are now referring to are those cases in which the wrongdoer has died, and the action of *assumpsit* is maintained against his executor. It is admitted that the action of *assumpsit* cannot be sustained on principle even in these cases; but it is allowed to be done for the reason that the action for the conversion is extinguished by the death of the wrongdoer, and the injured party would be without a remedy, unless he could maintain an action of *assumpsit* against the executor or administrator. Of course, where the wrongdoer has disposed of the property, a waiver of the conversion extinguishes all the elements of a tort, and ratifies the act of the wrongdoer in disposing of the property, and really makes him the agent of the party injured. In such a case, both upon reason and principle, the action of *assumpsit* can be maintained; but where the wrongdoer retains the property in its original form, and has neither disposed of it, nor used it, or received any benefit from it, the circumstances repel all implication of a promise in fact; and in order to maintain an action of *assumpsit*, it is necessary to overlook and ignore certain fundamental principles of the common law. If law is a science, and is to be treated by the courts as such, then the rule established by the cases which we have cited must be adhered to and followed.

II. But admitting for the present that the case is a proper one for the waiver of the tort, there is a fatal variance between the allegations of the complaint and the proof, or, more properly speaking, there is a total failure of proof. The complaint states a cause of action for stock sold and delivered, whereas evidence was introduced for the purpose of showing a conversion of the stock in question. "The complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language." (Code Civ. Proc., § 85.) "The code system is essentially a fact system intended to require the parties in judicial proceedings to state the particulars of their respective claims, and advise the opposite party of the true nature and object of the suit." (Maxwell on Code Pleading, § 105; Bliss on Code Pleading, § 245 *a;* Pomeroy's Remedies and Remedial Rights, §§ 517, 554.) When the action is upon an implied contract it is not proper to allege the promise, but the facts must be stated from which the promise is implied by law. (*Higgins* v. *Germaine*, 1 Mont. 230; Pomeroy's Remedies and Remedial Rights, §§ 537–40; Bliss on Code Pleading, § 245 *a;* Pomeroy's Remedies and Remedial Rights, §§ 572, 573.) Where a party pleads a contract and introduces evidence of a tort there is a fatal variance between the allegations and the proof. (*Distler* v. *Dabney*, 3 Wash. 200; Pomeroy's Remedies and Remedial Rights, 610.)

C. B. Nolan, and *T. J. Walsh*, for Respondent.

I. The plaintiff declared substantially on the common count for goods, wares, and merchandise sold, as his first cause of action, and the proof showed a conversion by the defendant of plaintiff's shares of stock represented by two certificates of the value, as the jury found, of eighteen hundred and sixty-nine dollars and fifty cents. The action as to that claim was brought upon the theory that the plaintiff had the right to waive the tort and sue as in *assumpsit*, though the proof showed no sale or other disposition of the stock by the defendant. Although some difference of opinion exists among the courts and text-writers, the question seems to have been put past discussion in nearly if not quite every state which has adopted the reformed code of procedure. This

result may not be a necessity from the adoption of this form of procedure and the manner of pleading it sanctions, but, if not, it is traceable to the original spirit of the code, namely, the giving to a party every remedy within reason, and with only such regard to forms and technical niceties as the due course of legal procedure will admit. The fact is strikingly noticeable in the array of authorities cited in appellant's brief, that, with only a few exceptions, they come from states which have thus far found themselves unable to break away from the ancient system of practice and pleading. The writers on the code agree that the action is properly brought, though the property converted has not been sold or otherwise disposed of. Bliss is authority in New York and the states whose system is modeled upon the code, and Pomeroy is equally and deservedly regarded as the standard in California and those states which follow its lead, and they both agree upon this point and in favor of the contention of the plaintiff. (Bliss on Code Pleading, 13; Pomeroy on Remedies and Remedial Rights, 567–69; Wade on Attachment, 22.) Without attempting to exhaust the list, but rather to give representative cases from different jurisdictions, the following are submitted as instances "where the facts are analogous to those of the case at bar," so far as the principle under discussion is concerned: *Putnam* v. *Wise*, 1 Hill, 234; 37 Am. Dec. 309, and note; *Walker* v. *Duncan*, 68 Wis. 624; *Norden* v. *Jones*, 33 Wis. 600; 14 Am. Rep. 782; *Hagaman* v. *Neitzel*, 15 Kan. 383; *Fratt* v. *Clark*, 12 Cal. 89; *Halleck* v. *Mixer*, 16 Cal. 574; *Alsbrook* v. *Hathaway*, 3 Sneed, 454; *Gordon* v. *Bruner*, 49 Mo. 570; *Kirkman* v. *Phillips*, 7 Heisk. 222; *Cooper* v. *Helsabeck*, 5 Blackf. 14; *Hill* v. *Davis*, 3 N. H. 384.) Many of the authorities cited by counsel do, in fact, support his contention; but it will be observed that no small number merely assert that when the property has been sold *assumpsit* will lie, without attempting to decide that it will not otherwise. A New Hampshire case is cited which will be found not to maintain the position of appellant. A long line of decisions in that state, following *Hill* v. *Davis*, 3 N. H. 384, establish the rule in that state in favor of the contention of respondent. So likewise the *dictum* in *Elliott* v. *Jackson*, 3 Wis. 649, does not declare the law of the state of

Wisconsin, the contrary having been repeatedly affirmed by the highest court of that state. But even in those states where the right to waive the tort and sue upon contract is restricted generally, it is admitted in cases in which the property came rightfully into the hands of the tort feasor originally by virtue of some contract or fiduciary relation, and he afterwards refused to surrender it to the rightful owner. (*Tuttle* v. *Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; *Aldine Mfg. Co.* v. *Barnard*, 84 Mich. 632; *McLaughlin* v. *Salley*, 46 Mich. 219.) So that whatever view the court takes of the question generally, it is not presented for determination here, since even in those jurisdictions which declare the general rule as contended for by appellant, the right to maintain the present action is asserted. And this is equally true for another reason. Whatever rule may be laid down as to the conversion of property generally, it is settled that *assumpsit* or *indebitatus assumpsit* at common law lies against a corporation for unjustly refusing to register a transfer, or for refusing to issue a certificate to one entitled to it. (Cook on Stockholders, 574; *Wyman* v. *American Powder Co.*, 8 Cush. 168; *Arnold* v. *Suffolk Bank*, 27 Barb. 424; *Kortright* v. *Buffalo Com. Bank*, 20 Wend. 91.)

II. It is asserted, however, with apparent earnestness, that, conceding the law to be as respondent contends, he cannot avail himself of it, because he has chosen to declare on the common count instead of setting forth the facts and then expressly averring a waiver of the tort. The discussion of this question as an abstract proposition by both Mr. Pomeroy and Mr. Bliss leave it involved in more or less doubt. The application of a simple principle of pleading ingrafted in all its vigor from the common law upon the code system ought to settle it, namely, that things are to be pleaded according to their legal effect. The principle, admitting its existence, as must be done for the purpose of this discussion, is that the owner is at liberty to treat the transaction as a sale, which he does by bringing his action on the contract and so alleging, and that the law implies a promise on the part of the tort feasor to pay for the property converted. If this is the legal effect of the defendant's acts, why should the pleading be otherwise than of the common count? And there is direct

authority for so pleading under both systems. (See the Michigan cases above cited, and *Walker* v. *Duncan*, 68 Wis. 624.) Upon matters of pleading under the code there is no court in the union ranks higher, either for the logic of its conclusions or the consistency of its decisions, than the supreme court of Wisconsin, and the appellant cites no authority in conflict with it. But this is not an important question. Whatever the court may think of it as an abstract proposition, this case will not be reversed because the pleader set out what the authorities he relies upon declare to be the legal conclusions from the facts, instead of setting forth those evidentiary facts. If the court should so hold it should now permit an amendment to be made or the variance should be disregarded. (*Pratt* v. *Hudson River R. R. Co.*, 21 N. Y. 307.) It is entirely evident from the record that no prejudice resulted from the style of pleading chosen by respondent. The appellant was perfectly conversant with the character of the evidence to be produced, was prepared to meet it, and did not undertake to assert, on the motion for a nonsuit, that it was at all surprised thereby.

Per CURIAM.—In this action plaintiff alleges sale and delivery by him, and purchase by defendant, of seven thousand four hundred and sixty-eight shares of the capital stock of the defendant company, of the reasonable value of two thousand three hundred and forty dollars and forty cents, but that defendant has failed to make payment therefor; wherefore judgment is demanded for recovery of that sum. And for a second cause of action plaintiff alleges a transaction whereby he claims defendant became indebted to him in the sum of one thousand two hundred and twenty-six dollars, with certain interest thereon, by reason of defendant having assumed and agreed to pay plaintiff's promissory note for that amount, which he and another had executed and delivered to Henry Klein. It appears this note provided for attorney fees, to be recovered, in case its payment was enforced by action at law, by the legal holder thereof; and, in addition to the demand for twelve hundred and twenty-six dollars and interest, plaintiff demands an attorney's fee of sixty dollars, presumably (but not expressly by allegation) predicating such demand

upon a condition in said note that, if payment thereof was enforced by an action at law, reasonable attorney fees for prosecuting such action should be recovered also.

As to this second cause of action it is admitted that defendant, before filing its answer, had fulfilled its obligation to pay the principal and interest of said note, but in its answer denies liability for any attorney fee for prosecuting plaintiff's action to compel it to pay said note. The question concerning this attorney fee is therefore the only point, respecting the second cause of action, involved in this appeal. As to this attorney fee it is plain that the defendant company is not liable therefor. It was not directly a party to said note, but in the arrangement between plaintiff and defendant the latter agreed to pay the note, and, not having paid the whole thereof when this action was brought, plaintiff assumed that he could, by this action, compel defendant to pay him the amount of said note, together with reasonable attorney fees for prosecuting his action to enforce such payment. Before the action came to trial, however, and before answer, defendant paid the amount of said note to the holder thereof. It is not shown that defendant had agreed to pay attorney fees for prosecuting an action at law to compel it to pay said note, and we are, without hesitation, of opinion that defendant is not liable for such demand. (*Lang* v. *Cadwell*, 13 Mont. 458.)

As to the first cause of action, for the recovery of the reasonable value of said stock, it appears that plaintiff relied upon the fact that defendant had tortiously assumed, held, and converted said stock to his own use, and therefore plaintiff alleges purchase thereof by defendant, on the theory that he could waive the tort, and sue as upon contract for purchase. Defendant specifically denied every allegation of plaintiff's complaint relating to the sale and purchase of said stock. It was developed on the trial that said stock had been placed in the custody of defendant's secretary, with an assignment indorsed thereon, transferring the same to A. McLain, under the condition that the same, with other stock, might be purchased by the latter on or before a certain date fixed, on payment of a certain sum per share. That, such arrangement having expired, or been entirely revoked, leaving plaintiff's stock in the pos-

session of the secretary of said company, subject to plaintiff's withdrawal or control, the plaintiff went to the secretary of defendant, and obtained his shares of stock, and indorsed thereon an assignment thereof to D. Galvin, and left the same in the hands of said secretary, explaining to him that plaintiff was about to borrow a sum of money from D. Galvin, and proposed to assign and place said stock as security for such loan. That he expected D. Galvin to arrive on a train, and consummate the loan and delivery of the security, and, in order to facilitate the transaction, as D. Galvin would have but a few moments to devote thereto, plaintiff had made this indorsement of assignment in advance of consummating such loan. That, as appears to be conceded, the loan in question was not consummated at all, and thereafter plaintiff called upon the secretary of defendant, and sought to obtain possession of his shares of stock, but defendant's secretary, as appears, did not deliver the same, saying there would be some new blank certificates of stock in possession of the company in a few days, and that when the same arrived he would issue plaintiff a new, clean certificate, representing his shares, in lieu of the old ones which had been indorsed by the assignments above mentioned. Being agreeable to that suggestion, it appears plaintiff left his stock in the custody of the secretary for some time; and, as appears from the testimony of plaintiff, in the mean time said secretary personally sought to purchase said stock from plaintiff, but such purchase was not effected. That after said certificates of stock had remained in possession of said secretary for some time, plaintiff demanded the delivery thereof to him, but the secretary refused to deliver the same to plaintiff, saying, "You have no stock in this company." On this state of facts plaintiff based his right to recover from defendant the reasonable value of said stock; and defendant appears to have undertaken to defend and justify the action of its secretary on the ground that, the plaintiff having made said indorsements on the certificates in contemplation of transferring them to D. Galvin as security for a loan, the secretary was justified in withholding said certificates of stock from plaintiff until D. Galvin reassigned them, or ordered their delivery to plaintiff. On this theory of defense the action was

tried, and instructions were given to the jury, and the jury found against defendant, in effect finding that its attempted defense or justification of its secretary's action was not well founded. Considering the theory of defense, and the evidence introduced in the action, we think the verdict of the jury is well supported.

Certain instructions of the court to the jury are complained of as being inconsistent. On the theory of the defense interposed by defendant, and on the facts shown, these instructions are entirely correct, and are favorable to defendant. Nor do we think the point that certain instructions are inconsistent is well taken. They merely set forth alternative views which might be adopted in the case, according to the conclusion which the jury reached from the testimony, and properly leave the jury in an attitude to adopt one or the other of such conclusions from the evidence.

The point is raised by appellant that there is a fatal variance between the proof and the allegations of the complaint, because the complaint alleges a sale of personal property described, and seeks to recover the reasonable value thereof but the proof shows a tortious taking and conversion. The complaint is in the nature of *assumpsit* upon contract of sale and purchase, but the proof discloses a tortious assumption, detention, and unwarranted refusal to deliver said stock to plaintiff on his demand therefor; and these facts, together with the implication which the law draws therefrom, are relied upon to support the complaint alleging a sale. No variance can be maintained on such a situation. The authorities at common law, and also those relating to code procedure and remedies, hold that a declaration in *assumpsit* is supported by proof of the wrongful taking and conversion of personal property; but there is a line of cases which confines the right of election to waive the tort, and sue and recover the value of the goods converted, as if sold to the wrongful taker, to cases where the latter had himself disposed of the property. This distinction has received very careful consideration and extended discussion by courts of last resort, and we think the great weight of reason and authority, especially of decisions under the reformed procedure, disregard

that distinction as immaterial in cases where the owner of the goods sues to recover the reasonable value thereof, on the very proper and rightful assumption that the taker proposed not to take the same without compensation to the owner, but to pay him the reasonable value thereof. If, however, the action was not for the reasonable value alone, but to recover for money had and received to the use of the owner by the wrongful taker through the sale of the goods, the plaintiff ought certainly to allege and prove the sale and amount received, because that shifts the measure for accounting from that of the reasonable value to the proceeds actually received by the wrongful taker through the sale of the goods. (Bliss on Code Pleadings, 2d ed., §§ 13, 153; Pomeroy's Remedies and Remedial Rights, §§ 567–73, and cases cited.)

It is also urged by appellant that the evidence is insufficient to support the verdict, because there is no evidence showing a sale by defendant of the property converted. This not being an action for money had and received by defendant through the sale of goods wrongfully taken from plaintiff, and it not being necessary to allege a sale, the point that the verdict is not supported because of want of proof of sale is not available in this action, for the reasons just shown.

It was urged in the closing argument on behalf of appellant (but not made a point in the brief of its counsel) that defendant could not be held liable for the conduct of its secretary in the matters herein involved, on the ground that the secretary had no authority to involve the company in the implied purchase of said stock; that such acts were not within the realm of his duties as such secretary, or within the scope of his authority as such officer. This seems to the court to be an important question in view of the evident relation and duties of a secretary to a corporation; and very likely such a defense would have been decisive of this case, so far as the defendant company was concerned, had it been interposed. But plainly no such defense was interposed at all in this action, and the argument of such a proposition on this appeal is entirely inconsistent with the defense interposed as disclosed by the record. Therefore, inasmuch as defendant appears to have undertaken to espouse the conduct of its secretary,

and justify his action in this respect, although it may have been outside of his authority or duty in his relations with defendant, still, if defendant wished to adopt and defend his conduct complained of in this action, and rest its defense solely upon that ground throughout the trial, and in presenting the motion for new trial, and in presenting the case on this appeal, in the brief and argument of its counsel, until the closing, we see no reason why the defendant should not be allowed to adopt its secretary's action as its own, and as within the scope of his authority, and the liability which follows.

It is proper to further remark that it is exceedingly doubtful that a corporation, without special authorization, can become purchaser of its own stock, which has been sold and outstanding in the hands of individual stockholders. It may, however, commit damage by wrongfully preventing a stockholder from having the use and benefit of his stock. But, as before remarked, the corporation in this case appears, as far as can be ascertained from the record, not to have relied upon such grounds of defense. We may, therefore, very properly presume, for the purposes of this action, that all concerned in the corporation—officers and stockholders—concurred in adopting the conversion of said stock by its secretary as their own act. If that be the case, it includes all who have any rights involved. A principal may adopt as his own the unauthorized act or transaction of an agent; and, having taken that position in defense of a suit, he could not afterwards, on appeal, be heard to deny the agent's authority.

The foregoing remarks upon this view of the case are made in order that this case may in no manner be regarded as affirming that an incorporated company may be held liable under such circumstances, if the proper defense were presented, repudiating the transaction, as well as the authority of its officer to bind it therein.

Ordered that judgment be modified, by disallowing recovery of attorney's fee on the second cause of action; otherwise judgment affirmed.

Modified.

All concur.

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STATE EX REL. JOHNSON ET AL., APPELLANTS, v. CASE, JUSTICE OF THE PEACE, RESPONDENT.

[Submitted March 8, 1893. Decided July 2, 1894.]

JUSTICE OF THE PEACE—*Jurisdiction to set aside judgment upon verdict.*—A justice of the peace, who, upon the return of a verdict for plaintiff for the amount of a note and interest, and for defendant for the costs of the action, has rendered a judgment in accordance with such verdict immediately, as required by section 794 of the Code of Civil Procedure, has no jurisdiction eight days afterwards to set aside such judgment as to the defendant, and to add to the judgment for plaintiff an attorney's fee and the costs of suit. (HARWOOD, J., dissenting.)

SAME—*Certiorari.*—Where a justice of the peace exceeds his jurisdiction in setting aside a judgment rendered upon a verdict, and rendering another judgment contrary thereto, such action is reviewable on *certiorari*, as an appeal to the district court would not afford to the party aggrieved an adequate remedy in that it would require a trial of the case *de novo*, in which no review of the action of the justice could be had. (HARWOOD, J., dissenting.)

Appeal from Fourth Judicial District, Missoula County.

APPLICATION for writ of *certiorari* to review action of a justice of the peace in excess of jurisdiction. Judgment dismissing the writ was rendered by MARSHALL, J. Reversed.

Statement of the case by the justice delivering the opinion:

This case comes here on an appeal from a judgment of the district court which dismissed an application for a writ of *certiorari* against a justice of the peace, and affirmed a judgment of that justice.

The application for a writ of *certiorari* in the district court shows that on February 6, 1892, Edmund Giggy commenced an action in the justice's court of J. F. Case against A. P. Johnson and John H. Bell, the relators in this application, and appellants herein, and that on February 16th the action was tried. The cause of action was upon a promissory note. Judgment was demanded for the amount of the note, interest, costs, and an attorney fee of twenty-five dollars. The defendants in that case (relators herein) now contend that they pleaded in that case what they claim was a tender of the amount of the promissory note, with interest, made before the commencement of the action. They offered to submit to a judgment for the amount of the note and interest, without

costs. A jury was demanded in the justice's court, and the cause was tried before such jury upon that issue. The jury found a verdict for the plaintiff for the amount of the note and interest, without costs, and a verdict for the defendants for the costs of the action. The jury were then discharged. On the same day (February 16th) the justice entered judgment in accordance with that verdict. Afterwards, on the 23d of February, the plaintiff made a motion in the justice's court, which he called a "motion to correct the judgment." The motion was, in substance, as follows: Plaintiff moves the court to correct the verdict of the jury, and the judgment rendered by the court upon said verdict, and to tax the costs of said action to the defendants herein, for the reason, etc. This motion was by the justice granted, and, in pursuance thereof, on the 24th of February, the justice entered a judgment against the defendants for the amount of the note, and interests and costs, and also, after hearing proof, as the justice's docket of February 24th recites, for fifty dollars attorney's fee in favor of plaintiff.

So, it appears that the defendants, on the 16th of February, obtained, in pursuance to the verdict of a jury, a judgment in accordance with what they here contend that they claimed; that is, that they should pay the note, with the interest, and that they should not pay the costs of the action. It then further appears that the justice, in effect, on a later day (February 24th), set aside the judgment which he had rendered on the 16th of February in accordance with this verdict, and gave a so-called judgment for the plaintiff for the whole amount, with costs and an attorney's fee of fifty dollars. The defendants thereupon applied to the district court for a writ of *certiorari* to review the action of the justice of the 24th of February; their claim being that he exceeded his jurisdiction in giving the judgment of that date, and that there was no appeal therefrom, nor any plain, speedy, and adequate remedy. (Code Civ. Proc., § 555.) Upon the hearing of the *certiorari* matter in the district court, that court dismissed the writ, and affirmed the judgment of the justice of the peace of February 24th. From that judgment of the district court this appeal is taken.

The questions now before this court are, Did the justice of the peace, in rendering the judgment of February 24th, exceed his jurisdiction? And, if so, was there no appeal from that judgment? And was there no plain, speedy, and adequate remedy other than by *certiorari?*

Henry C. Stiff, for Appellants.

Murray & Musgrave, and *George W. Reeves*, for Respondent.

DE WITT, J.—This case is in fact an action *ex relatione*, in which the relators are A. P. Johnson and another, and the respondent is J. F. Case, a justice of the peace, although the papers in the court below were entitled *Johnson et al.* v. *Case.* (*Territory* v. *Potts*, 3 Mont. 364.)

Section 794 of the Code of Civil Procedure provides, in reference to justice courts: "Upon a verdict by a jury the justice shall immediately render judgment accordingly." In the case at bar the justice followed this statute; and, in accordance with the verdict of the jury, and on the same day, to wit, February 16th, he entered judgment for the claim and interest against defendants, and judgment for costs against the plaintiff. On motion of plaintiff, on February 24th, the justice undertook to partially set aside the judgment above described, and thereupon enter another judgment. This attempted judgment of February 24th varied from the judgment of February 16th, in that it added to the judgment against defendants an attorney's fee for the plaintiff, and also taxed the costs against the defendants, which was contrary to the verdict of the jury, and contrary to the judgment of February 16th. This was not done upon a new trial. A new trial was not applied for, nor granted, nor had. The action of the justice was simply a setting aside of the verdict of the jury as to costs, and the judgment in accordance therewith, and the entering of another and different judgment as to the costs, with the attorney's fee added to the judgment for plaintiff, without any further or other trial. For convenience in referring to the action of the justice, we will call the judgment of February 16th the first judgment, and the action of the court of February 24th the second judgment. As we understand this case,

all that was sought to be attacked and overthrown by the writ of *certiorari* in the district court was the second judgment. No attack was, or ever has been, made upon the first judgment, except the action of the justice of February 24th. The issue and contention upon the trial on February 16th were solely as to the costs, as defendants admitted their liability upon the demand and interest. It is quite likely that that issue was not properly made, and that the pleadings were such, and defendants' alleged tender was such, that the judgment of February 16th, in favor of defendants for costs, was erroneous. But, upon the application for the writ of *certiorari*, no one complained of the first judgment. The question was whether the justice had jurisdiction to render the second judgment, and to that inquiry, we think, we should address ourselves.

The statute provides that "upon a verdict by a jury, the justice shall immediately render judgment accordingly." (Code Civ. Proc., § 794.) "When the prevailing party is entitled to costs . . . . the justice shall add their amount to the verdict." (Code Civ. Proc., § 799.) As the case was tried to the justice the "prevailing party" was, in effect, the defendants, i. e., the defendants prevailed in the contention. The only contention was as to the costs. In this defendants prevailed, i. e., the verdict was in their favor. The justice rendered judgment in accordance with the verdict, and in favor of defendants for costs. The word "immediately," as used in the statute above, has often been construed by courts. It has sometimes been construed as liberally as to mean twenty-four hours. But we have not observed that it has ever been construed as eight days. Now, if the justice is to immediately render judgment upon the verdict of the jury (§ 794), and if he is to add the costs to the verdict (§ 799), it would seem to be in contemplation that the question of who was to pay costs was something determinable upon the return of the verdict, and the immediate rendering of judgment; that is, we say that the question of, against whom the judgment for costs is to be, seems to be determinable with the general verdict. We do not think that we can be understood as holding that a justice has no jurisdiction or power after judgment to add an omitted item of costs, or cut out an item wrongly and inadvertently

taxed. Such questions we do not understand are now before us, and upon them we express no opinion. What we are considering is the matter of a verdict and judgment upon the question of who shall pay the costs—not what the costs should be, in items. And, the matter of who shall pay the costs being adjudged by a justice in accordance with the verdict of a jury (§ 794), has the justice jurisdiction, eight days afterwards, to set aside that judgment, and readjudge the costs against another party? We understand that to be the question before us.

On February 16th there was a judgment in favor of defendants for their costs. Plaintiff did not attempt an appeal from this judgment. It was rendered by the justice upon the verdict of a jury. (Code Civ. Proc., § 794.) We are of opinion that we should not hold, under the circumstances of this case, that the costs were simply an incident of the judgment in the justice court, and, therefore, that the justice could add them eight days after the trial. Such view was not presented by counsel for the justice, who appeared and argued the case in this court. Whatever may be suggested about costs being incidental to the judgment occurs to us as scarcely applicable to this case, where the costs, instead of being an incident, were in fact the only contention which was tried—improperly tried, perhaps; the issue badly pleaded, probably. But still it was the only contention tried, and therefore seems not quite properly called, in this case, "incidental." The verdict and judgment for costs in favor of defendants was separate and independent, and was not attached to any other judgment. It does not, therefore, seem to be appropriately called "incidental." We are of opinion that the proceeding of the justice in rendering the judgment of February 24th was clearly beyond his jurisdiction. (Code Civ. Proc., § 794; *Winter* v. *Fitzpatrick*, 35 Cal. 269; *Weimmer* v. *Sutherland*, 74 Cal. 343; *Fox* v. *Meacham*, 6 Neb. 530; *Foist* v. *Coppin*, 35 Ind. 471; *Foster* v. *Alden*, 21 Mich. 507; *Stephens* v. *Santee*, 49 N. Y. 35; *Hamill* v. *Bosworth*, 12 R. I. 124; *People* v. *Delaware Common Pleas*, 18 Wend. 558; *Corthell* v. *Mead*, 19 Col. 386.) In the Colorado case last cited it is held that, when a justice enters judgment on a verdict of a jury, his act is simply ministerial, and not judicial. That case further remarks: "The judgment

being entered according to the verdict, the aggrieved party may appeal; but the justice has no authority to render any judgment contrary to the verdict, and, if he does so, such judgment may be regarded as a nullity. Any other doctrine would involve proceedings in justices' courts in troublesome, expensive, and vexatious delays, and would greatly hinder and embarrass the administration of justice. (Freeman on Judgments, § 53 *a;* High on Extraordinary Legal Remedies, §§ 235–42.)"

The attempted judgment of February 24th was therefore void. Then, the question remaining for our consideration is, Can that judgment be reached and overturned upon a writ of *certiorari?* The respondent contends that an appeal lies to the district court from the justice court, from such judgment, and cites *Ducheneau* v. *House,* 4 Utah, 363; *Saunders* v. *Seed Co.,* 6 Utah, 431; *Trustees* v. *Shepherd,* 139 Ill. 114; *Sioux Falls Nat. Bank* v. *McKee* (S. D., Jan. 26, 1892), 50 N. W. Rep. 1057; *Livermore* v. *Campbell,* 52 Cal. 75; *Fox* v. *Nachtsheim,* 3 Wash. 684.) He therefore contends that if an appeal lay from the judgment of the justice of February 24th the *certiorari* was properly dismissed by the district court. (*Hayes* v. *District Court,* 11 Mont. 225.) But let us examine whether, in fact and in substance, there is an appeal which reaches the attempted judgment of February 24th. Anderson's Law Dictionary defines an "appeal" as, "To remove a cause to a higher court for review and retrial." In general terms, an appeal is a resort to an upper court, to review the action of a lower court.

In the justice court in this case there were two records, each of which is called in the argument a "judgment." One was the first judgment, of February 16th; the other was the second or attempted judgment, of February 24th. Of the former, the defendants had no complaint. The latter was their grievance, which they wished to have righted. If the defendants could have appealed from the second judgment, and if they could have had that action of the justice reviewed, and if they could have had the district court decide whether the justice of the peace was right or wrong in his action of February 24th, and if, it appearing he was wrong in that

respect, the district court could have reversed that wrongful action, and have sent the case back with directions to the justice to wipe out the attempted judgment of February 24th, and leave defendants as they ought to have been left by the justice (that is, with the judgment of February 16th standing until it was properly attacked), then, if such could have been the result of the appeal by the defendants from the justice's to the district court, the defendants would have had an appeal in substance as well as in name—an appeal which would have reached the grievance which they claimed to have suffered. But an appeal to the district court would have wrought out no such result as as above suggested. Had the defendants appealed, the district court would never have reviewed the pretended judgment of February 24th. The case would have been tried *de novo*. The attempted judgment of February 24th and the judgment of February 16th would have each been ignored, and the matter would have been tried *de novo* in the district court. There would have been a retrial in that court of the merits of the case. There would not have been a review of the performance of February 24th. The latter, the defendants wanted; the former, they did not. They would therefore get what they did not want, which would be an injury to them, and would be deprived of that which they sought to obtain. They would ask for bread, and receive a stone. (*State* v. *Evans*, 13 Mont. 239.)

If it be suggested that an appeal by defendants from the judgment of February 24th would obtain for them a review of the determination of the question of who should pay the costs of the action in the justice's court, it may be replied that defendants had obtained a judgment in their favor once (February 16th) upon that subject (a judgment which had been set aside by the justice without jurisdiction), and, if there were appealing to do, defendants had the right to look to plaintiff to assume that burden. It is said in the Colorado case, cited above: "Did petitioners have a plain, speedy, and adequate remedy, by the ordinary course of law, for the action of the justice in refusing to enter judgment upon their verdict? It is urged that their remedy was by appeal, but this view is not sustained by sound reason, nor by the weight of authority.

As we have seen, the justice, in assuming to arrest judgment upon the verdict, and in dismissing the case against claimants, acted wholly without authority. Even if the claimants could have appealed from the entry of such orders, such a remedy would not have been adequate. They had tried and won their cause, and were entitled to the fruits of their victory. Why should they be required unnecessarily to assume the expense, trouble, and hazard of another trial? Judgment should have been entered upon the verdict, and then the burden of an appeal, if any had been taken, would have fallen upon the plaintiffs. The taking of an appeal is a matter of some inconvenience and hardship. It involves the giving of a bond, with surety, and the advancement of costs, as well as the hazard of another trial. A remedy, therefore, which required the claimants, rather than the plaintiffs, to take an appeal, was not adequate. Besides, if the judgment had been entered for the claimants, it is not certain that any appeal would have been taken." (*Corthell* v. *Mead*, 19 Col. 386.)

It is said by the supreme court of California, as to another matter, but of kindred nature: "A mandate that the superior court proceed to a hearing of the appeal on the merits, or to a retrial of the issues, would not annul, but simply ignore, the order dismissing the appeal. The order must first be annulled by a direct proceeding; that is, by *certiorari*. Such is the remedy when the court has entered a judgment or made an order in excess of jurisdiction." (*Levy* v. *Superior Court*, 66 Cal. 292.) So, in the case at bar, by an appeal the defendants in the justice court would attack and destroy that which was not to them a grievance, but rather a benefit; that is, the judgment of February 16th. And they would never be able to attack or have reviewed the grievance which they sought to appeal from, and which, in name and in shadow, they would appeal from; that is, the attempted judgment of February 24th. We are satisfied that such an appeal would be wholly unsubstantial. It would not be a review or retrial of the matter complained of. (See definitions of "appeal," *supra*.) Its only characteristic of an appeal would be its name.

It is said in *Sioux Falls Nat. Bank* v. *McKee* (S. Dak., Jan. 26, 1892), 50 N. W. Rep. 1057: "To justify the issuance of the

writ, there must not only appear an excess of jurisdiction, but that there is no appeal or other adequate remedy. If the judgment complained of could have been brought to this court by appeal, and the question of jurisdiction determined in such proceeding, that fact alone would prevent the issuance of the writ. Upon this point the statute could hardly be plainer. The evident design of the statute is to make appeal the ordinary method of bringing cases up for review, and *certiorari* an extraordinary method, to be resorted to only when necessary to save rights which would otherwise be lost."

We are of opinion that the case at bar is just such an one as is suggested in the closing words of that South Dakota case. The *certiorari* before us in this case is necessary "to save rights which would otherwise be lost." It is necessary to save to the defendants in the justice court the right to have the illegal action of the justice on February 24th obliterated and destroyed, and, moreover, to have it destroyed without carrying down in such destruction the judgment of February 16th. Such right of defendants to demolish the illegal judgment of February 24th, and preserve the judgment of February 16th, could not be saved by an appeal on the part of the defendants, and such right could be saved by this writ of *certiorari*. (*Fox* v. *Nachtsheim*, 3 Wash. 684; *Paul* v. *Armstrong*, 1 Nev. 95.)

The result of these views is that we are of opinion that, conceding that an appeal did lie from the justice court to the district court, yet that such an appeal was one in name only, and was not an appeal in substance or in fact, as reaching to the grievance. *Certiorari* was therefore an appropriate remedy against the justice. The judgment of the district court, dismissing the writ of *certiorari* and affirming the judgment of the justice, is reversed, and the case is remanded, with instructions to the district court to sustain the writ of *certiorari*, and, in pursuance thereto, to annul the judgment which the justice of the peace attempted to render and enter on February 24th.

Reversed.

PEMBERTON, C. J., concurred in the conclusion.

HARWOOD, J., dissenting.—Viewed in the light of the facts disclosed by the record, it seems to me the foregoing is a

remarkable treatment and determination of this case. The authorities cited and quoted are undoubtedly correct in affirming that a justice of the peace is bound to enter judgment according to the verdict returned by the jury upon the issues involved in a case submitted to a jury. I do not understand that there is a dispute, or a difference of opinion, upon that proposition. Nor do I suppose the learned judge of the district court, whose decision is, by the foregoing opinion, declared erroneous, and ordered reversed, would hesitate a moment to so hold, upon such a point being presented. My impression is, that a reporter preparing the foregoing opinion for publication would note, as his *syllabus*, that "A justice of the peace must enter judgment, in a case tried in his court, according to the verdict of the jury returned on the issues presented; and a judgment entered contrary thereto will be annulled by a higher court on writ of *certiorari*. Judgment of the district court, holding otherwise, reversed." And I presume it would be a matter of some astonishment to those reading the majority opinion, and regarding the case from the impression thereby conveyed, that the learned judge of the district court should have fallen into such palpable error, and a matter of more astonishment that there should be dissension in this court on so plain and simple a proposition, especially in the light of the foregoing exposition. But notwithstanding a *syllabus* to the effect above stated would, as I think, express the impression naturally derived from the foregoing treatment, and state a correct conclusion of law upon a hypothetical proposition of fact, I cannot subscribe thereto as applicable to determine the case at bar, because, on submission of the opinion for concurrence, my examination of the record disclosed what seemed to me a state of facts showing an entirely different case than that manifestly proceeded upon in reaching the conclusion announced. This led to a very thorough canvass and discussion, in the counsels of this court, of the facts disclosed by the record. But to my surprise, not finding any facts reconcilable to the assumptions of the majority opinion, the same was nevertheless adhered to as originally determined upon; and, evidently to support the same in point of fact, a statement of the case has been prefixed thereto, which purports to give the

facts upon which the determination of the majority, reversing the district court, is based. Therein, after briefly setting forth the nature of the proceedings in the justice's court, the review and affirmance thereof on writ of *certiorari* by the district court, and the appeal therefrom to this court, it is stated that "the defendants in that case (relators herein) now contend that they pleaded in that case what they claimed was a tender of the amount of the promissory note, with interest, made before the commencement of the action." The same assumption is also reiterated in that statement of the case, as follows: "So it appears that defendants, on the 16th of February, obtained, in pursuance of the verdict of the jury, the judgment in accordance with what they here contend that they claimed; that is, that they should pay the note, with interest, and that they should not pay the costs of the action." From this it plainly appears that the majority, according to the statement prefixed to their opinion, proceed not upon what the record shows defendants pleaded in the case,—although the pleadings are entirely in writing, prepared by counsel of the respective parties, and fully set forth in the record,—but they proceed upon the assertion that defendants "now contend that they pleaded in that case what they claimed was a tender," or, as they secondly assert in the statement, "what they here contend they claimed; that is, that they should pay the note, with interest, and that they should not pay the costs of the action."

The taxation of costs is the only thing involved in this case; and the important—the vital—point upon which this decision turns is whether defendants pleaded a tender in the justice's court. Indeed, that is really the only fact stated in the majority statement, outside of the mere mention of the nature of the case and how it came to this court; and that important proposition as to defendants' plea of tender is reiterated in the majority statement of the case. Now, if the record on file in this case showed that defendants pleaded in the justice's court a tender prior to the commencement of the action, and that they followed it up, when the action was brought, by depositing in court the amount due, as required by section 504 of the Code of Civil Procedure in such cases, it would thereby clearly appear that the ruling of the district court was wrong, and

ought to be reversed; and there would not be a moment's dissension on my part from the majority decision to that effect. On the other hand, if the record shows the contrary, the majority of this court proceed upon an hypothesis which contradicts the record, and the decision of the majority is utterly wrong and defenseless, and the district court was right. But if the record, which contains the pleadings, disclose that defendants pleaded facts showing a tender of payment prior to the commencement of the action, why not so state in unequivocal language?

Wherefore is it said in the majority statement that defendants "now" and "here" "contend" that they did something —that defendants pleaded a tender—in a particular wherein the record discloses just what defendants pleaded? That fashion of statement, it seems to me, would appear extraordinary in any statement of facts upon which depended the solemn determination of the rights of litigants, but especially so in respect to pleadings prepared by counselors at law, in writing, which are set forth in the record. Even if the pleadings in the justice's court had been stated orally, the law requires the same to be noted by the justice in his docket (Code Civ. Proc., § 770), and the docket entries are set forth in the record. Herein is the vital point on which the decision ought to and does turn,—the point of contention, and the one in respect to which the record was carefully scrutinized and discussed. And an examination of the record discloses that it does not show either that defendants pleaded in the justice's court a tender of payment prior to the action, or that they followed up any such "contended" tender by deposit in court of the amount admitted to be due, as required by statute in case a tender had been made. (Code Civ. Proc., § 504.)

The majority statement of facts does not come into direct conflict with the record, because that statement, as we have seen, asserts only that defendants "here contend" that they pleaded a tender. Forbearing comment, it is sufficient to bring to view these conditions respecting the treatment of the case in this court to show the point and cause of dissension. I therefore proceed to an examination of the case as shown by the record.

It appears from the proceedings disclosed by the record in

this case that an action was commenced in the justice's court of J. F. Case, justice of the peace in Missoula county, by Edmund Giggy, plaintiff, against A. P. Johnson and J. H. Bell, defendants, to enforce payment of a promissory note. The complaint in the action sets forth the execution and delivery of the promissory note by defendants, whereby they promise to pay B. F. Buffum $150, with interest at a rate stated, the assignment and transfer of said note to plaintiff, the nonpayment thereof, that said note provided for recovery of reasonable attorney's fees in case of its enforcement by action, and that $25 was a reasonable fee for the prosecution of this action to enforce payment thereof, and demands judgment for the amount of the note, with interest and said attorney's fee and costs of suit. Defendants answered, admitting the execution and delivery of said note and the indebtedness thereby evidenced, but alleged that on a certain date, before the commencement of the action, at a certain place in Missoula county, defendant Johnson (quoting from the answer) "tendered to plaintiff, in lawful money of the United States, the full amount then due upon said note, less the sum of $22.16, then owing and due to Johnson by said plaintiff, but that plaintiff then and there refused to accept the same. And defendants further allege that on the 13th of February, 1892, defendant Johnson recovered judgment in the justice's court in and for," etc., "in the sum of $22.16, and $24 costs of suit, and that no part of said judgment has been paid; that said A. P. Johnson is willing, and hereby consents, that said judgment be applied as a setoff against the demand of plaintiff. Defendants further allege that they, each of them, are willing, and now offer, that judgment be entered against them in this action for the sum of $150, principal of the note sued upon, with interest thereon from," etc., "to the present date, without costs, and defendants demand judgment against plaintiff for their costs herein expended."

This is the answer of defendants, as shown by the record. There is no denial that the note provided for recovery of reasonable fees for services of plaintiff's attorney in prosecuting an action to enforce payment thereof, or that $25 was a reasonable fee for such services. It appears that the justice, on motion of plaintiff, struck out of said answer the allegations therein

relating to recovery of said judgment against plaintiff by defendant Johnson for $22.16, and $24 costs. As the pleadings then stood, plaintiff alleged, and defendants admitted, the indebtedness represented by said promissory note, that it was due and unpaid, and that plaintiff ought to have judgment (quoting from the answer) "for the sum of $150, principal of the note sued upon, with interest," as stipulated in the note, "to the present date."

The facts alleged as to tender show no legal tender whatever. Defendants' counsel plainly recognize this, for having alleged the facts about Johnson's claim against plaintiff for $22.16 "damages," and tender of payment of the amount due on the note, less that claim for damages, and recovery of judgment against plaintiff by Johnson in the justice's court for that amount of damages—having interpolated all those facts into the case—defendants manifestly do not rely upon them as a legal tender, because they close their answer with an offer to allow judgment for the whole amount of the promissory note, "with interest to the present date." Interest would have stopped at the date of tender, had a legal tender been made. A tender less an amount of damages demanded by the debtor from the creditor would not ordinarily be a good legal tender at all, because the creditor would not be bound to accede to the opinion of the other as to the amount of damages. Even after the demand for damages had been fixed by judgment in the justice's court it is not relied on as an offset; for it is expressly shown in the answer that defendants offered to have judgment entered against them for the full amount of the note, with interest to date of judgment, and the alleged facts as to judgment for damages were stricken out of the answer. Therefore, it left the answer of defendants with the allegation as to tendering payment, less said damages, followed by an offer to allow judgment to be entered against defendants for the full amount of plaintiff's claim, with interest to date, but "without costs." Now, while the answer failed entirely to plead a legal tender, and the majority of this court do not affirm that the facts alleged in the answer constituted a legal tender, but cover the point by setting down in the statement of the case that defendants "here contend" that

they pleaded a tender, still, for the sake of great liberality in viewing defendants' position, I may grant that, in so far as merely offering payment previous to the action, the facts alleged in the answer constituted so much of a tender. Nevertheless this bare offer of payment was insufficient to throw the burden of costs on plaintiff, unless defendants brought the amount due into court, and deposited the same there for plaintiff, according to the requirements of section 504 of the Code of Civil Procedure. It is not pretended that any one ever "contended" that was done. This is a provision of statute which requires that where previous tender is alleged the amount due shall be brought into court for plaintiff. It is reasonable and just, too. In such a case there is absolutely no reason for court proceedings; no reason for summons, trial, or execution, which accrue court costs. The money is laid down in court and, if previous tender is found to have been made, plaintiff takes payment of the debt by taking the money deposited in court without entry of judgment or necessity for execution, and the costs are taxed against him. That is the only way to put the parties on a proper basis to rightfully compel plaintiff to pay the costs of an action. Should defendant be allowed to come into court, and say that upon a certain time he tendered payment of the debt, and then keep the money in his pocket, and say, "I am willing the plaintiff shall take judgment, and get what he can out of it, and hunt me with an execution in the hands of an officer of the law, and collect the judgment, if he can, at great expense, but the plaintiff shall pay the costs in the case"? The statute plainly answers this question in the negative, and the justice of the peace and the district court followed the plain provision of the statute; but the majority of this court overrule them, however, without mentioning the facts shown or the disregarded statute.

Turning to another view of the law, as applied to the facts disclosed by the record, it should be noted that the statute provides that "If the defendant, at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs there accrued, but if he do not accept such offer before the trial, and fail to recover in the action a

sum larger than the one mentioned in the offer, he shall not recover any costs accruing after the offer was made, but the offer and failure to accept shall not be given in evidence to affect the recovery otherwise than as to costs." (Code Civ. Proc., § 797.) Defendants offered, as we have seen, to have judgment entered against them for the full amount claimed by plaintiff; so there was not, nor could there be, any dispute or trial as to the amount for which plaintiff should have judgment. But defendants, without having pleaded any tender, or depositing any thing in court, as required by section 504 of the statute in case they "contended" here, as the majority statement asserts that they pleaded a tender prior to the action; and without having any offset, or relying upon any, defendants confessed that plaintiff ought to have judgment for all he asked, and offered to allow judgment to be entered for the full amount demanded, not with costs then accrued, as the statute provides, but attached to their offer a condition that judgment might be entered against them, "without costs," and that plaintiff should pay the costs.

In this attitude defendants stood in court, and demanded a jury trial, as disclosed by the record in this case; and a jury was impaneled, and the constable sent for witnesses, and some sort of a trial ensued, upon the demand of these defendants, whereby costs exceeding $100 accrued, as shown by the record, when in fact there was no issue whatever to try. It certainly did not require a jury to find that plaintiff should recover the amount of his note, "with interest to present date," when that was confessed by the written answer of defendants, nor to try the validity of an alleged offset which, although alleged, was not relied on, and was stricken out and abandoned. Nor was there need of a jury to try the question of a tender which had not been alleged, nor made good by a compliance with the statute if it had been alleged. There was absolutely nothing presented in the case to try. And, observe, the majority of this court do not venture, in the face of the record, to affirm the contrary. Nevertheless, defendants demanded a jury trial; and the upshot of the wrangle before the jury was that a verdict was returned to the effect that plaintiff have judgment for the amount of said note and interest, already confessed, but

added that the costs be taxed against plaintiff. Thereupon, on the 16th of February, the justice entered judgment in favor of plaintiff for recovery of the amount of the note ($150) and interest, according to its terms, but taxed the costs which had accrued (exceeding $100) against plaintiff. Thereafter, on the 24th of the same month, plaintiff's counsel moved the justice to tax the costs of said action against defendants, on the ground that the law required the justice to tax the costs of an action in favor of the party prevailing. (Code Civ. Proc., § 828.) This motion related entirely to the taxation of costs, and did not ask the justice to either set aside or re-enter, or otherwise make any entry touching, the judgment for the principal recovery. The motion is as follows: "Now comes the above-named plaintiff, by his attorneys, and moves the court to correct the verdict of the jury in the above-entitled action, and the judgment herein rendered by the court upon said verdict, and tax the costs of said action to the defendants herein, for the reason that said verdict is contrary to law, and not warranted by the statutes of the state of Montana; and, second, for the reason that said verdict, as returned, in so far as it relates to the costs, is contrary to law, and absolutely void." It is made to appear in the majority statement and opinion that the justice of the peace, "in effect, on a later day (February 24th), set aside the judgment which he had rendered on the 16th of February." The record contains the justice's docket entry made on the 24th, and therein I am unable to find any provision, either in terms or "in effect," setting aside the judgment for the principal recovery in favor of plaintiff, entered on the 16th. That docket entry deals with the motion to tax the costs to defendants, and grants the same, and then orders that plaintiff recover "of defendants the sum of $150, with interest from the date of said note until paid, together with costs of the action." Instead of setting aside the judgment of February 16th, this later docket entry, which followed the first, reaffirms the judgment for the principal recovery, saying that plaintiff should recover the amount demanded and confessed, together with "his costs of this action." Now, had the justice of the peace jurisdiction to tax the costs, as required by law and the

facts appearing in the case, eight days after entry of judgment for recovery of the debt claimed by plaintiff?

When the real point for consideration is brought into view, as disclosed by the record, it is found to relate merely to the taxation of costs, which is a subject generally held to be incidental to the main recovery, and the costs provided by law are to be taxed as the law directs. The statute regulating practice in justices' courts provides that "costs shall be allowed the prevailing party in the justice's court." (Code Civ. Proc., § 828.) But this provision, of course, is to be construed in harmony with section 797, which provides that the defendant may, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum; and, if no greater sum is recovered in the action, he shall not be liable for the costs accruing after such offer is made. Section 799 provides that, "when the prevailing party is entitled to costs by this chapter, the justice shall add their amount to the verdict." These provisions of statute gave the justice jurisdiction to tax the costs against defendants, when applied to the facts in the case as admitted. The plaintiff prevailed completely in this case, without the necessity of trial or verdict, as the pleadings stood.

I observe with astonishment that in the majority opinion it is asserted that "defendants prevailed." If courts are instituted merely as a place for the propagation of costs on the "contention" of a litigant in some matter outside of the record (without foundation, too, because in this case it was confessed that plaintiff ought to have judgment for all he asked)—if courts are instituted as a place for that purpose defendants prevailed, as the majority opinion is pleased to assert. But if the court is instituted for the purpose, among others, of enforcing delinquent obligations, to give judgment therefor, especially where defendants confess, by solemn pleading in writing, that plaintiff is entitled to all he asks, and to see that the provisions of statute are enforced and observed in such matters, then plaintiff prevailed. But I do not propose to dwell upon such a proposition. If, where a plaintiff brings an action in court, asking for a judgment for the amount of an obligation due, and the defendants, by written answer, confess that plain-

tiff ought to have judgment for the full amount asked, and show no prior tender of payment, nor even pretend to rely thereon by paying the money into court, and there is nothing whatever presented for trial —if, in such a case as that, it is to be asserted that defendants prevailed, I am willing to leave such assertion without comment. The statute above referred to, applied to the facts disclosed by the record, gave the justice the jurisdiction to tax the legal costs of the action to defendants. The justice followed the law, with the exception of taxing one item of cost not authorized by law, which will be noticed below. The district court was right in affirming the proceedings of the justice, except as to the item of cost mentioned.

Moreover, the district court properly dismissed the writ of *certiorari*, whereby the proceedings of the justice of the peace were brought up for review, on the ground that relators had a remedy by appeal, if dissatisfied with the action of the justice in taxing the costs as part of the judgment against them in this court. If so, *certiorari* could not be invoked to review and correct, even if erroneous, said action of the justice in the adjudication in his court. The statute (Code Civ. Proc., § 822) provides that "any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment." The statute regulating the use of the writ of *certiorari* (Code Civ. Proc., § 555) provides that "the writ shall be granted in all cases when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Relators were evidently dissatisfied as to the costs taxed against them as part of the judgment in the justice's court, resulting from the adjudication of the case therein. The taxation of costs allowed by law belonged to the adjudication, and depended upon the facts shown therein; and in no other way could it be determined by any court whether the justice was right or wrong in taxing the costs against the defendants. It is true, in this particular case, the facts are all shown and admitted by the pleadings, and thereby the propri-

ety of taxing costs against defendants appears by looking at the pleadings. This, however, discloses the facts, without the necessity of the trial of any disputed facts; but it yet remains for the court to apply the law to the facts in determining the case, both as to costs as well as to the principal judgment.

In the case of *State* v. *Evans*, 13 Mont. 239, it was held that the action of the justice there shown could not have been corrected on appeal; hence the jurisdictional question involved in the action of the justice was properly reviewable by a writ of *certiorari*. Why? Because on appeal the appellate court would adjudicate and determine the issues in the case by trial *de novo;* but such trial of the issues involved in the case would not include the review or correction of the irregularities or unwarranted action on the part of the justice as to forfeiting defendant's bail money deposited to guarantee her appearance, which was in excess of the justice's jurisdiction, and was not involved in the issues, either of fact or law, to be determined on appeal, if appeal had been taken. But here, in the present case, it is insisted that relators have an adequate remedy by appeal, because the action of the justice complained of was directly concerned with the adjudication of the case, and depended upon the adjudication and determination thereof, which would also come into adjudication and necessarily be determined by the appellate court on appeal. This seems to be true. The appellate court, on appeal, would determine every thing in dispute involved in the issue, and apply the law to the facts found or admitted. In thus passing judgment on the appeal and trial *de novo*, the appellate court must necessarily also assess costs against the parties subject thereto, according to the requirements of law and the facts shown, as part of the judgment; and by appeal the party dissatisfied with the action of the justice in taxing the costs would clothe the district court with power to determine the question as to who should be subjected to the costs of the case. It cannot be denied that defendants had the right of appeal, and that the action of the justice complained of would thereby have been placed directly within the adjudication of the district court for such determination as the law and the facts demanded. If that be true,

it follows, without question, that *certiorari* would not lie, because of the remedy available by appeal.

The foregoing discussion relates entirely to the question of taxation of the costs provided by law, as shown by the proceedings in the action, and to the jurisdiction of the justice to tax such costs as directed by statute in favor of the party prevailing in the principal recovery. If the justice of the peace should add to the judgment any sum, under the guise of costs, not authorized by law and the proceedings as legitimate costs in the case, such as taxation of an attorney's fee, where the pleadings showed no foundation therefor, his excessive action in that respect would undoubtedly be subject to correction through the writ of *certiorari*, because such element added to the judgment would be found, on review of the proceedings, to be entirely foreign to the case, and hence in excess of the jurisdiction of the justice—as much so as though he should adjudge any other recovery in no way pertaining to the case presented. There appears in this case such an element, for the return of the justice to the writ of *certiorari* shows that on the 24th of February, when he considered the motion, and determined to assess the costs of the action to defendants, he also, on motion, inquired, by hearing of evidence, as to what would be a reasonable fee for services of plaintiff's attorney in prosecuting the action to enforce collection of said note, and determined that $50 was a reasonable fee for such services, and included that sum in the costs taxed against defendants. As already shown, defendants did not deny the allegation of the complaint that the note provided for the recovery of a reasonable attorney fee in case the obligation was enforced by action at law, nor that $25, as alleged, was a reasonable fee for that service. No foundation appears for the assessment of any further sum in that respect; and such assessment, therefore, is entirely unwarranted, and in excess of the jurisdiction of the justice in the case. I think the district court should have modified the proceedings of the justice by eliminating from the assessment of costs the excessive sum of $25 taxed as attorney fee. This point, however, may not have been brought to the attention of the district court. The case may have been argued in the dis-

trict court wholly upon other points of contention, as it was here. And, with the modification mentioned, the rulings of the justice and of the district court were correct, as plainly appears when the case, as disclosed by the record, is examined and considered.

STATE, RESPONDENT, v. ANDERSON, APPELLANT.

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[Submitted July 5, 1894. Decided July 9, 1894.]

CRIMINAL LAW—*New trial—Misconduct of juror.*—A new trial, sought upon the ground of alleged misconduct of a juror in using improper language in the jury-room, is properly denied when such misconduct is attempted to be shown by the affidavit of a third person to whom the juror had stated the circumstance, particularly where the use of the language is denied by the affidavit of the juror himself and six of his fellow-jurors.

SAME—*Same—Prejudice of juror.*—An expression by a juror, after a verdict of guilty, to the effect that if defendant got a new trial and was turned loose he would shoot him like a dog, cannot be taken as proof, on motion for a new trial, that he had an opinion and was prejudiced when impaneled as a juror, where the juror, by affidavit, states that the feeling so expressed was formed upon hearing the evidence on the trial.

SAME—*Same—Prejudice of juror.*—The denial of a motion for a new trial, based upon *ex parte* affidavits, to the effect that a juror had stated before the trial that defendant was a tough citizen, and that he had made the unqualified assertion that defendant ought to be hung, but without giving any details, or the context of the conversation, and there being nothing to indicate what affiant's notion of the word "unqualified" was, cannot be held to have been an abuse of discretion, where the juror had testified on his *voir dire* examination that he had no prejudice against defendant and had formed or expressed no opinion as to his guilt or innocence, and was absent from the state so that his counter-affidavit could not be obtained upon the hearing of the motion.

SAME—*Same — Newly discovered evidence.* — Newly discovered evidence is not ground for a new trial where its only tendency is to contradict testimony, given by a witness for defendant, to the effect that defendant had given him details of the killing at a time in the night when only a participant could have known of them, and which was the only notice he had received that night, by showing that he had received information of the crime on the same night from another person.

SAME—*Same—Newly discovered evidence.*—A new trial in a capital case will not be granted upon the ground of newly discovered evidence which consists of an unsworn statement to the judge, made by an accomplice, to the effect that the defendant was innocent, that he had committed the murder himself, and that he had lied on the trial, where such statement was made after the state had accepted his plea of guilty in the second degree and shortly before the date set for defendant's execution, and was inconsistent with the facts otherwise proved in the trial, there being no showing that his testimony on the second trial would be different from that given on the first.

Appeal from Sixth Judicial District, Park County.

THE defendant, Robert A. Anderson, informed against as Robert Field, was convicted of murder in the first degree. Defendant's motion for a new trial was denied by HENRY, J. Affirmed.

Sidney Fox, and *M. R. Wilson*, for Appellant.

County Attorney H. J. Miller, and *E. C. Day*, for the state, Respondent.

I. The declarations of the juror Rich as to what occurred in the jury-room are inadmissible to impeach the verdict. (*State* v. *Richmond*, 42 La. Ann. 299; *State* v. *McNamara*, 100 Mo. 100; *Palmer* v. *State*, 65 N. H. 221; *People* v. *Stimer*, 82 Mich. 17; *Devere* v. *State*, 5 Ohio Cir. Ct. 378; 12 Am. & Eng. Ency. of Law, 378, and cases cited.) Besides, these occurrences are all denied in the affidavits of the jurors. And where the evidence as to misconduct is conflicting, the decision of the trial court will not be disturbed. (*People* v. *Anthony*, 56 Cal. 399.)

II. The fact that, after a verdict has been rendered, the accused ascertains for the first time that before the jury was impaneled a juror had formed and expressed an opinion as to to his guilt, is not a ground for a new trial under the Montana statutes. The right to move for a new trial is purely statutory. (*State* v. *Fry*, 10 Mont. 407.) The misconduct referred to in section 354, division 3, of the Compiled Statutes is only that which occurs after the jury has been impaneled and sworn. (*People* v. *Fair*, 43 Cal. 137, overruling *People* v. *Plummer*, 9 Cal. 298; *Leeper* v. *State*, 29 Tex. App. 63, overruling *Breckenridge* v. *State*, 27 Tex. App. 518, and other cases; *State* v. *Marks*, 15 Nev. 33.) Assuming that the affidavits are sufficient to bring the case within those in which the court have the power to grant a new trial, it was still a matter within the discretion of the court, which has not been abused. (1 Thompson on Trials, § 116; *State* v. *Harrison*, 36 W. Va. 729; *Hill* v. *State* (Ga., Feb. 13, 1893); *Ellis* v. *State*, 92 Tenn. 85; *Black* v. *Territory*, 3 Wyo. 313; *Carthaus* v. *State*, 78 Wis. 560.) But the question is not open in this state, as our supreme court has already held that where the evidence is conflicting as to the

disqualifying expressions, the matter rests in the discretion of the trial court. (*Territory* v. *Burgess*, 8 Mont. 57.) And in *Spies* v. *People*, 122 Ill. 1, the court says: "It is a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statement is subject to no test whatever." (Followed in *State* v. *Peterson*, 38 Kan. 204.) The affidavits fail to show that the prisoner or his counsel did not have knowledge of such disqualifying fact when the juror Rich was accepted. This is an indispensable requirement. (1 Thompson on Trials, 122, note 1.)

III. The court did not err in overruling defendant's motion on the ground of the newly discovered evidence set forth in the affidavit of George B. Scott. The affidavit fails to show when this evidence was discovered, what diligence was used to procure it, or that it could not have been produced on the trial had the parties desired it. (16 Am. & Eng. Ency. of Law, 564, et seq.; *Stoakes* v. *Monroe*, 36 Cal. 383; *People* v. *Nelson*, 85 Cal. 421; *Caruthers* v. *Pemberton*, 1 Mont. 111.) Newly discovered evidence as a ground for new trial is regarded with disfavor, and showing must be strict. (*Baker* v. *Joseph*, 16 Cal. 174; *Arnold* v. *Skaggs*, 35 Cal. 684.) Newly discovered evidence must be shown to be material. (*Arnold* v. *Skaggs*, 35 Cal. 684; *Stoakes* v. *Monroe*, 36 Cal. 383.) If we can go to the record of the evidence on the trial, we will find that this evidence, in so far as it is material, would, if believed, impeach the testimony of the defendant and his own witness Atkins. This of itself is sufficient to justify the court in rejecting it. (*State* v. *Stain*, 82 Me. 472; *State* v. *Johnson*, 72 Iowa, 393; *People* v. *McCauley*, 45 Cal. 146.) Newly discovered evidence going only to a single circumstance and not to the main issue is not in itself sufficient to warrant the granting of a new trial. (*Statham* v. *State*, 84 Ga. 17.) The granting of a new trial on the ground of newly discovered evidence is entirely within the discretion of the trial court, which will not be reviewed except in a clear case of abuse. (*State* v. *Morris*, 109

N. C. 820; *Carson* v. *Dellinger*, 90 N. C. 226; *Hobler* v. *Cole*, 49 Cal. 250.)

IV. The court did not err in overruling defendant's motion on the ground of Mortimer's contradictory statements made since the trial. The fact that a witness since the trial has made statements contradictory of his former testimony is not a ground for new trial. (*State* v. *Workman*, 38 S. C. 550; *Lasseter* v. *Simpson*, 78 Ga. 61; *Attaway* v. *State*, 56 Ga. 363.) The court will not set aside a verdict obtained by perjury, unless the witness has been convicted of perjury. Courts do not look with favor upon this class of newly discovered evidence, especially where the evidence is that of the perjurer. (*Dyche* v. *Patton*, 3 Jones Eq. 332; *Holtz* v. *Schmidt*, 12 Jones & S. 327; *People* v. *McGuire*, 2 Hun, 269.) It must also be shown that the witness will testify differently on the next trial, but there is no one connected with this case who has been found willing to swear that the witness Mortimer will testify differently on the next trial. (*Spillars* v. *Curry*, 10 Tex. 143.)

Henri J. Haskell, attorney general, also for Respondent.

DE WITT, J.—The defendant was convicted of murder in the first degree. He appeals from the judgment. His motion for a new trial was denied. He now asks us to review the alleged causes for a new trial which he set up on that motion. We will examine them in their order:

1. Misconduct by the juror Rich: It is set forth by the affidavit of S. M. Nye that he had a conversation with juror Rich after the trial, in which said Rich said to him substantially as follows: "When we went out, four of the jury were in favor of acquitting the defendant. I told them that if we were going to acquit the defendant, or have a hung jury, that we had better send up and have our Winchesters brought down to us, and have them loaded to the muzzle; that, if we did not convict, we dare not face the people without our guns." The affidavit of a juror as to his misconduct in the jury-room is not to be taken to impeach his verdict. (See cases cited in *Gordon* v. *Trevarthan*, 13 Mont. 387; 40 Am. St. Rep. 452.) If what a juror says on oath, by affidavit, is not to be taken to impeach

his verdict, it would seem, *a fortiori*, that what another person says that the juror said should not be taken for such purpose. But, if the Nye affidavit were to be considered, Rich denied by affidavit that he used such language, and six of his co-jurors, by affidavit, deny that he (Rich) had used any such language in the jury-room as was attributed to him by the Nye affidavit. (*Territory* v. *Burgess*, 8 Mont. 57.) The decision of the court, in denying a new trial on this ground, was unquestionably correct.

2. The defendant presented affidavits that recited that, since the trial, juror Rich had said: "If that man gets a new trial, and is turned loose, he shall never get out of this town alive. I will shoot him down with my own hand, like a dog." Rich, in his affidavit used on the hearing, does not deny that he made use of these expressions, but he says that they were all made since the verdict was rendered, and that his opinion so expressed was formed by hearing the evidence adduced at the trial, and that when he was impaneled as a juror he had no bias or prejudice whatever. These expressions are urged as showing prejudice by the juror Rich. "Prejudice" means "prejudgment"; "judgment beforehand." Rich's statements certainly show his opinion or judgment as to defendant's guilt. His verdict also showed that, as it ought. But the expressions do not show his prejudgment or prejudice. The showing is uncontradicted that this was the juror's after judgment—his opinion after the trial—and formed upon hearing the evidence. His opinion of the guilt of the defendant, after the trial, and after verdict of guilty, cannot be taken as proof that he held such opinion before the trial, in the absence of any showing that he did hold such opinion, and in the presence of the express showing that he did not hold any such opinion before the trial. This ground for new trial was also properly overruled by the court.

3. Disqualification of the juror Rife, by reason of expression of opinion, showing bias, made before the trial, is the next ground for new trial presented. Rife was a juror called on open *venire* after the regular panel was exhausted. W. Altimus makes affidavit that he was in the sheriff's office one day after the killing of deceased, and before the trial; that Rife came in, and "when informed that Field, the defendant, was

in jail, charged with the murder, he said, 'You had better watch him pretty close, for he is a tough citizen,' or words to that effect." Rife has had no opportunity to deny the matter set up in this affidavit since it was made. He has been absent from the state, and, in the haste of making this motion for a new trial, he could not be reached. But Rife did testify under oath, on his *voir dire* examination, and subject to cross-examination as to details, that he had no bias or prejudice against defendant, nor had he formed or expressed any opinion as to the guilt of defendant. The district court had before it the oral examination of Rife, and the *ex parte* affidavit used against him. This expression alleged to be used by Rife does not tend to show bias or prejudice, or an opinion of the guilt or innocence of the defendant. (*Territory* v. *Burgess*, 8 Mont. 57.) Because a juror may have a general opinion that a defendant is a "tough citizen" is not evidence of the possession by such juror of the opinion that the defendant is guilty of the particular crime with which he stands charged; especially when the juror testifies, under examination and cross-examination, that he knows nothing about what purport to be the facts of the case, and has no opinion as to the guilt or innocence of defendant. Most bad men have a reputation in the community in which they live. A knowledge of such reputation, coupled with ignorance of all the alleged facts of the offense charged against defendant, and an absence of all opinion, bias, or prejudice, is not a disqualification of a juror.

Again, as to juror Rife, we have the affidavit of H. H. Ash, in which he says "that he is personally acquainted with, and well knows, a certain Frank Rife, who was a juror on the trial of the above-entitled action, upon which trial defendant was on the eighteenth day of May, 1894, convicted of the killing of one Emanuel Fleming, at the city of Livingston, on the twentieth day of April, A. D. 1894, and a verdict of murder in the first degree brought in and rendered; that on or about the tenth day of May, 1894, and before said Rife was summoned as a juror in said cause, affiant had a conversation with said Rife, in which conversation said Rife made the unqualified assertion, 'Field ought to be hung.'" Upon affidavits of this nature, Mr. Justice De Wolfe perti-

nently remarked in *Territory* v. *Burgess*, 8 Mont. 57, as follows: "In this connection, it is not improper to say that the temptation is strong on the part of a defendant who has been convicted in a criminal case, and particularly on the grave charge of murder, to try and obtain a new trial on the two grounds alleged in this case—of misconduct of the jury, and incompetency of a juror by reason of having expressed an opinion in the case. These, when the facts clearly establish the misconduct in the one case, or the expression of an opinion by a juror in the other, are plainly sufficient grounds for granting a new trial. But in view of the temptation on the part of the defendant, and also on the part of his friends, to obtain a rehearing in the case of conviction, and in view, also, of the facility with which affidavits for this purpose can be obtained, courts should closely scan affidavits procured for that end, and, unless convinced of their correctness, should not be influenced by them in granting a new trial; and this, we think, has been the action of the district court in the present case." As above noted, there was no opportunity to obtain Rife's statement as to the truth of the Ash affidavit. The motion for new trial was necessarily hurriedly prepared, and heard less than twenty-four hours before the time set for the execution of the defendant. Rife was out of the state, and could not be reached. Under such circumstances there would be a great temptation to a friend of the defendant to make such an affidavit as the Ash affidavit. Both the affidavit and the circumstances should be closely scanned. They doubtless received such scrutiny from the learned district judge. He had heard Rife's oral examination on his *voir dire*, in which he stated that he had not formed or expressed any opinion as to the guilt of defendant. Against that, he had this affidavit, made under the circumstances that it was, and wholly wanting in any details. The affiant does not say where he and Rife were when Rife made the statement, or who, if any one, was present, or whether any one was present. He wholly omits all the context of the conversation in which Rife is alleged to have made the statement. It is not stated what called forth the remark by Rife. Affiant simply says that Rife made the "unqualified assertion." We have no means of knowing what affiant's notion of the word

"unqualified" was. If the facts and circumstances, and surroundings of the parties, the context of the conversation, what led to the remark, and the occasion for it, had been given in the affidavit a reviewing court would have some grounds upon which to determine whether the statement alleged to have been made by Rife was "unqualified," and whether the district court abused its discretion in discarding this affidavit, as against the oral examination of the juror.

It is said in the Burgess case: "The affidavit was *ex parte*, while the juror was examined openly in court, and was interrogated by counsel for defendant, as well as by the court. The court had a full opportunity to see the demeanor of the witness, as well as to hear his words, and, from both, was doubtless convinced of the sincerity and truth of his statement; otherwise the court would not have overruled the motion for new trial. In this we cannot say that any error or abuse of judicial discretion was committed." If such skeleton affidavits are to be entertained by an appellate court, on which to grant a new trial, after the district court (with its near view of all the circumstances, and its personal inspection of the juror upon his examination) has discarded them, then all the murderer's friends need do is to watch for the absence of some juror, on the verge of execution, and make such an affidavit as the one before us. We think this case comes within the doctrine of the Burgess case. (*Territory* v. *Burgess*, 8 Mont. 57.) In that case, it is true, the alleged offending jurors made a counter-showing, under oath, on the motion for a new trial. That element in the Burgess case is absent from the case at bar. But we are of opinion that this absence is compensated for in the fact that the motion for new trial here was made upon the eve of the execution of defendant, when Rife could not be obtained to make a counter-affidavit, and the fact that the district judge had the oral *voir dire* examination and cross-examination of Rife, and the further fact of the character of the affidavit itself, as shown above. We have thus satisfied ourselves that this ground for a new trial was properly overruled by the district court.

4. Newly discovered evidence is also set up as a ground for a new trial. William Mortimer testified upon the trial that

he and defendant Field together killed the deceased. Mortimer was the only eyewitness of the killing who testified to the fact on the trial. He described it, and the movements of defendant and himself, before and after the killing, in great detail. The murder was committed about 9:30 P. M., in the outskirts of the city of Livingston. Shortly after the assault upon deceased, Field offered himself, and was accepted, as a member of the sheriff's posse. He went out on horseback up the river. He called upon the people at several houses, without arousing them. He awakened one Charles Atkins about three miles from Livingston. Defendant testified to this himself. Defendant called Atkins as a witness. Atkins testified that Field aroused him, at his home, at 1:30 A. M., following the killing of deceased. Atkins testified that Field told him, to some extent, how the killing was done. The state has taken the position that, according to Atkins' testimony, Field told Atkins more details as to the killing than any one could have known at that time, unless he had been a participant in the assault. It seems that this matter told strongly against defendant. On motion for new trial comes George B. Scott, and makes affidavit that on the same night, between one and two o'clock A. M., he aroused Atkins, and informed him what had occurred, and what was known of how it was done. But he does not state what he knew then, or what he told Atkins, of how the murder was done. Atkins had testified that Field's call was the only notice he had received that night of the murder. Scott's affidavit, as above noted, was presented on the motion for new trial as newly discovered evidence. It is nothing more than an attempted contradiction of Atkins (Field's own witness) in respect to Atkins' statement that his only information of the murder on that night was from Field. This is not a ground for a new trial, and it was properly so held by the district judge.

5. Other alleged newly discovered evidence was presented as a ground for granting the motion for a new trial, which we will now consider: As observed above, William Mortimer was the only witness for the state who testified as an eyewitness of the fatal assault upon the deceased, Emanuel Fleming. His testimony was direct, positive, and minutely detailed as to the

killing of Fleming by himself and Field. No one in behalf of defendant has ever contended that the evidence was not sufficient to sustain the verdict. No motion for a new trial was made upon the ground that the verdict was contrary to the evidence. The time to make such motion was allowed to pass. It is appropriate to state here that in our opinion the evidence is amply sufficient; and by this we mean, not only the testimony of Mortimer, the accomplice, but also all the facts and circumstances, and the conduct and admissions of he defendant himself. On May 22d judgment was rendered, sentencing defendant to be executed June 22d. On June 17th the witness Mortimer stated to the Honorable Frank Henry, judge of the district court, that he (Mortimer), alone, murdered Fleming. He made this statement to Judge Henry orally. He also gave to the judge the following writing:

"LIVINGSTON, MONTANA, June 17, 1894.

"I, William Mortimer, hav swor to lies on the stand in the district cort on the trile of Bob Anderson who was on trile for the murder of Emanul Fleming. I was the man that did the dede I was promist by John Hogan that if I wold turn stats evedance that the dores of the county jale wold be throw open and I wold go forth a free man and also promist by County Attorney Miller that not a hair on my head wold be harmed I murdered Fleming unaded and alone Anderson did not now any thing about it He is as inocent as a babe unborne. I jave had enough of truble about the afair and do not wish to kep my secrit longer. If the govnor will not turn Anderson lose I will call on the people of Park county to do it, as Robert Anderson is as inocent of the crime as the govnor is. I have bin lead to what I did through Hogan and did swere Robert Andersons life away but I have come to my sences I think before it is to late. WILLIE MORTIMER."

This writing was given by Judge Henry to defendant's counsel. The writing, and the statement made orally by Mortimer to Judge Henry, are made the basis of a motion for a new trial on the ground of newly discovered evidence.

The argument of defendant is that this "confession," as we will call it for the sake of a name, is newly discovered evidence

that Mortimer lied in a vitally material matter upon the trial. The state replies that it was the contention of defendant on the trial that Mortimer was lying, and therefore this alleged newly discovered evidence is only cumulative or impeaching, and hence not a ground for a new trial. We think we may pass this contention of counsel, and place our decision upon another ground; that is, that the alleged newly discovered evidence in this case was not sufficient, under the facts and circumstances developed, to reverse the decision of the district court, and direct it to grant a new trial, even if it were conceded that such evidence was not simply cumulative or impeaching. If, instead of such a showing as we have in this case, there were presented to a court on motion for a new trial a showing whereby it clearly appeared, to the satisfaction of a reasonable judicial mind, that the principal and only eyewitness for the state, upon whose testimony, without corroboration, the conviction depended, had lied in his material testimony, we are not prepared to say that the court hearing such motion should not grant the same.

But, as above remarked, passing this matter, we will decide this ground for a new trial upon our opinion that the district court should be sustained by reason of the insufficiency of the alleged newly discovered evidence, in whatever light it may be viewed. We will state our reasons for this opinion; but first it may be observed, in passing, that the state makes a showing on the motion, by affidavit, that Mortimer's statement, as given in evidence on the trial, was given voluntarily. In Mortimer's written statement of June 17th he says that he swore to lies on the trial. But the only lie which he claims he was guilty of was his connecting Field with the murder. He still leaves himself in the case as a participant. He still leaves in the case the great mass of details and circumstances, aside from the actual participation by Field in the fatal assault. In fact, by his statement of June 17th, Mortimer simply lifts Field out of the case for the few minutes while the actual striking and shooting took place. These men were intimate. They lived together. They were companions. Mortimer is a boy of seventeen. Field is twenty-eight. They had been living together in a cabin a few miles from Livingston. They came

to town this afternoon separately, and each put his horse in the stable belonging to Mortimer's mother. They went down town together, and then returned to the Mortimer house. They were there shortly before the killing. Defendant said he was going to the house of a relative near by. Mortimer invited him to return, and stay all night. After the killing, Mortimer got Field's horse and rode off to the cabin where they had been living. Field knew that Mortimer had taken the horse, and followed him directly to the cabin. But we do not think it is necessary, in this opinion, to state the great mass of testimony, which covers several hundred pages of the record. Counsel, in an extended and able argument, have presented every thing which seemed to them important. We have listened attentively, and have studied this case thoughtfully, as becomes the gravity of the result of an affirmance; and, without writing down the analysis which has brought us to the result, we feel ourselves wholly justified in saying that all the facts, details, circumstances, and the vast *minutiæ* of the case, are entirely consistent with the truth of Mortimer's testimony on the trial—that he and Field killed Fleming. The more we analyze the case the stronger grows confirmation of this view. On the other hand, the facts, details, circumstances, and *minutiæ* are totally inconsistent with the truth of Mortimer's confession of June 17th. We could not construct a narrative of the case, as we find it in that part of the evidence which is left untouched by the confession of June 17th, which would make a story consistent with Mortimer alone being the murderer. It is thus that the alleged confession appears to us, in reading the whole case, in cold and unsympathetic print. Judge Henry arrived at the same result as we do, but he had the living witnesses. He even had the confession of Mortimer by word of mouth and personal presence. We do not hesitate to say that we cannot disturb his decision.

It may be further observed, as confirming our view, that the district court should be sustained, that there is no showing that Mortimer would testify on another trial differently from that which he testified on the first. No one says that he would. The only suggestion that he would is his statement made to

Judge Henry, not under oath. It is proper to observe another fact in this case. Field had been convicted and sentenced. Mortimer had pleaded guilty of murder in the second degree. His plea had been accepted. He was awaiting sentence, and Field was within a few days of execution. Then Mortimer promulgates this statement of June 17th. It looks much as if he considered that he had made himself safe from a sentence for murder in the first degree, and then used one more effort to save his accomplice. If a new trial is to be granted on such showing there is nothing to prevent Mortimer from playing battledore and shuttlecock with the Field case for all time. The Mortimer confession came to the district court in such questionable shape, and so utterly discredited by every thing in the case, that we cannot say that the learned judge of the district court was wrong in discarding it.

Finding no error in the case it is ordered that the judgment be affirmed. It appearing that a respite has been granted by the governor until Friday, July 13, 1894, in order that defendant might present his appeal in this court it is further ordered that the judgment of the district court be carried into execution as provided in section 377 of the Criminal Practice Act. *Remittitur* forthwith.

Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

STATE, RESPONDENT, v. OSNES, APPELLANT.

[Submitted July 5, 1894. Decided July 9, 1894.]

JURY—*Selection.*—Failure of the clerk of the district court to act as one of the five jury commissioners provided for by the act of March 14, 1889 (16th Sess. Laws, 166), does not render the selection of a jury illegal, since under section 12 of said act a majority of such commissioners may discharge the duties required by the statute.

NEW TRIAL—*Remarks of judge during trial—Fining defendant.*—Where the court provoked by the obstinancy of the defendant upon a trial for murder fined him with some display of temper for refusing to answer a proper question on cross-examination, but afterwards, when the defendant answered the question upon advice of his counsel, remitted the fine and admonished the jury not to permit themselves to be prejudiced thereby, such occurrence is not sufficient to authorize a new trial upon the ground that the court abused its discretion to the prejudice and injury of the defendant.

HOMICIDE—*Admonition to jury—Oral instructions.*—An admonition by the court to the jury in a murder trial not to permit themselves to be prejudiced against the defendant by a certain occurrence during the trial, but to determine the question of guilt or innocence solely from the evidence, is not an instruction, as to the giving of which orally error could be assigned.

SAME—*Evidence.*—On a trial for murder, testimony by a witness that she knew the defendant, and that he came to her house four or five days before the murder with men whom defendant wanted her to assist in robbing, telling her they were lately from Norway, is admissible in rebuttal where the defendant had denied being at her house at that time with the deceased, and had testified that the only time he was at her house during the month with two men was early in the month, while the killing occurred on the last day of the month.

Appeal from Tenth Judicial District, Choteau County.

CONVICTION for murder in the first degree. The defendant was tried before DU BOSE, J. Affirmed.

T. W. Murphy, and *George W. Sweet*, for Appellant.

Henri J. Haskell, attorney general, John W. Tattan, and *B. L. Powers*, for the state, Respondent.

PEMBERTON, C. J.—On the twenty-first day of May last, the appellant was convicted of the crime of murder in the first degree, in the district court of the tenth judicial district, in and for Choteau county, and was thereafter sentenced to be hanged. From the judgment and order of the court overruling appellant's motion for a new trial this appeal is prosecuted.

The appellant complains that the jury that tried him was not a proper or legal jury, for the reason, as shown by affidavit, that the district clerk did not act with and as one of the jury commissioners that selected the jury in this case, as required by law. While it is true that the clerk of the district court is by law one of the five commissioners whose duty it is to select juries, yet section 12, page 168, of the Laws of 16th Session, provides that "the absence of one or two commissioners appointed under the provisions of this act shall not prevent a majority of said commissioners from selecting the juries and doing and performing all other acts directed and required to be done under the provisions of this law." There is no showing or contention that appellant has been in any manner injured on this account. There is no error or irregularity in this assignment of which the appellant can properly complain. The

appellant complains that pending the trial, and while he was being examined as a witness, the judge abused his discretion by fining the appellant, and using language calculated to prejudice him with the jury.

The circumstances are substantially as follows: Counsel for the state, while the appellant was being cross-examined as a witness in his own behalf, asked the appellant a question—seemingly a proper question; appellant declined to answer, because, he said, the counsel had abused him; thereupon the court fined the appellant, and threatened to continue to do so until he answered. The court also admonished appellant that his failure to answer might prejudice him with the jury; told appellant that he was fair and impartial in the matter, and advised him to leave the witness-stand and consult his counsel, saying that he thought his own counsel would agree with the court that it would be best for appellant to answer the question. After consulting with his counsel appellant agreed to answer, and did answer, the question propounded to him. Thereupon the court remitted the fine it had imposed upon appellant. Of course these things all occurred in the presence of the jury. Before the jury retired, the court called their attention to these occurrences, and admonished them that they should not permit themselves to be prejudiced thereby—that they should determine the question of the guilt or innocence of the appellant solely from the evidence in the case.

The appellant contends that this admonition of the court was, in effect, an oral instruction, and therefore error. We do not think it was in any respect an instruction. It was simply an admonition to the jury not to permit themselves to be prejudiced by a matter that had taken place in their presence. While the court displayed some impatience and irascibility, doubtless provoked by the obstinancy of the appellant, still we are unable to discover any thing in the language or conduct of the court to authorize us in holding that the appellant was prejudiced or injured thereby.

The appellant contends that the court erred in permitting one Blanche Brandt to testify in rebuttal. It is contended that the testimony of this witness was not rebuttal. While the appellant was on the witness-stand he was asked by coun-

sel for the state, in substance, if he had not gone to the house of witness Blanche Brandt on Thursday or Friday before the Saturday night on which the deceased was killed, in company with the deceased and another, and if he did not, at that time and place, state to said witness, Blanche Brandt, that he had two Norwegian boys outside, who had just come from Illinois; that they had money, and that he wanted her to help him fix them by putting them to sleep, to get the money; and if she, Blanche Brandt, did not refuse to have any thing to do with the matter. The appellant denied all these things. The appellant testifies that he was at the house of Blanche Brandt about the first part of the month of March, in company with one Enger and one Johnson, but was never there in company with the deceased. After the close of defendant's evidence, Blanche Brandt testified that she knew the appellant well; that four or five days before she heard of the killing of the deceased the appellant came to her house with two other men; that the appellant came in and told her he had a good chance to make some money; that he had two fellows, lately from Norway, who had money—one, seven hundred dollars, and the other eleven hundred dollars; that he asked her for a spare room; that he wanted her to fix them—put them to sleep; that he asked her if she did n't know how; that she told him she knew nothing about it, and would have nothing to do with it; that thereupon appellant left. We think this evidence of Blanche Brandt was clearly rebuttal, and admissible as such. While she does not identify either of the persons with appellant as the deceased, yet her testimony does tend to contradict and rebut the evidence of the appellant that he was at her house only once in March, and that early in the month, in company with Enger and Johnson. The deceased was killed on the 31st of March, as the record shows, and the witness Blanche Brandt testifies that it was four or five days before she heard that the deceased had been killed, and she thinks on Friday that the appellant came to her house with the two men from Norway, and sought her aid in fixing and putting them to sleep in order to get their money. The court permitted appellant to offer evidence to explain and contradict the evidence of Blanche Brandt. The appellant testified, as above stated, that

it was in the early part of March that he was at her house with Enger and Johnson. Enger testified that he was at her house, but did not go in, some time in March (he did not know the time in March) with appellant and Johnson. It may be true that appellant Enger and Johnson were at the house of Blanche Brandt in the early part of March, but this does not prove that appellant, with deceased and another, were not there also four or five days before she heard that deceased had been killed on the thirty-first day of March. But whatever of conflict or contradiction there was in the testimony of these witnesses was a matter to be determined by the jury. We think, from any view, the evidence of the witness Blanche Brandt was properly admitted.

The record in this case is imperfect. The instructions of the court are not here. Nor is there any contention that the instructions were not fair to the appellant. There is only a small portion of the evidence in the record. But there is no complaint that the evidence, as a whole, does not warrant the verdict of the jury in this case. The errors assigned are purely technical, and without substantial merit. We are of the opinion that no error has been assigned, called to our attention, or discoverable in the record that would justify us in disturbing the result of the trial below, solemn and serious as the result may be to this unfortunate appellant. Judgment and order appealed from are affirmed. And it appearing that the appellant has been granted a respite by the executive of this state until the thirteenth day of July, 1894, pending the presentation and determination of this appeal, it is therefore ordered that the judgment of the court below be executed on that day in accordance with the provisions of section 377 of the Criminal Practice Act. *Remittitur* forthwith.

Affirmed.

HARWOOD and DE WITT, JJ., concur.

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GRAND OPERA HOUSE COMPANY ET AL., RESPONDENTS, v. MAGUIRE, APPELLANT.

[Submitted July 2, 1894. Decided July 14, 1894.]

JUDGMENT—*Findings—Mortgage—Error in description.*—This court is not warranted in disturbing a finding of the trial court that a mortgage which contained an error in the description of the premises intended to be covered thereby, and which had been voluntarily reformed by the parties subsequently to commencement of the work for which appellant claimed a mechanic's lien, took precedence to such lien, where it appeared that the error was palpable, and, the evidence not being contained in the record, there was nothing to indicate that the finding was not based upon knowledge by the lien claimants of such error.

MECHANIC'S LIEN—*Foreclosure—Possession by lienor—Prior mortgagee—Removal of building.*—Under the provision of the mechanic's lien law (Comp. Stats., div. 5, § 1876), preserving to a lienor a right to the building or improvement superior to that of a prior mortgagee of the land, with right of removal within a reasonable time after a sale, a purchaser, who is in possession of premises under a sale upon the foreclosure of his lien, is entitled, as against the holder of a mortgage having priority to his lien as to the land, to remain in possession of the premises until the foreclosure of the mortgage, without losing his right to remove the building. In such case the reasonable time within which the building or improvement should be removed is prior to the time when the lienor must yield possession of the land to the mortgagee under his foreclosure proceedings, but the removal should not be made until after the period for redemption allowed by law to the proprietor, as well as to the mortgagee, has expired.

SAME—*Same—Removal of building—Decree.*—A lien claimant does not lose his right to remove from the owner's land the building or other improvement upon which his lien has been enforced, by failing to claim such right upon foreclosure, and to have the decree provide for the removal of the building within a reasonable time. Nor would the lien claimant's right of removal be affected by the fact that the building was of brick or stone, the removal of which would involve great loss.

MORTGAGES—*Foreclosure—Proof of attorneys' fees.*—Testimony by an attorney of ability and experience as to what would be a reasonable attorney's fee for foreclosing a mortgage, which is elicited upon a statement to him of the character of the case and the amount involved, is proper, and in such inquiry the witness may be asked on cross-examination for what compensation a competent lawyer could be procured to prosecute such an action on behalf of his own client.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to foreclose a mortgage. The cause was tried before BUCK, J. Plaintiff obtained a decree adjudging defendant's title by foreclosure sale under a mechanic's lien, subsequent to plaintiff's mortgage, both as to the improvement as well as the land. Reversed.

William Scallon, for Appellant.

Forbis & Forbis, for Respondents.

HARWOOD, J.—As regards the point relating to the reformation of the mortgage, we find no ground to disturb the finding and holding of the trial court to the effect that appellant's lien claim ought not to apply precedent to the mortgage on the east seventeen and one-half feet of lot 16, which the building covered. It appears the building covered the west one-half of lot 14, all of lot 15, and the east seventeen and one-half feet of lot 16. The mortgage was executed, delivered, and recorded in September, 1888, prior to the commencement of the building through which the lien rights accrued, and correctly described said land, except as to the seventeen and one-half feet of lot 16. As to that, the word "west" was inserted by mistake, as alleged, in the original mortgage, instead of the word "east," as the parties had agreed and intended. Thereafter, in the month of February, 1889, upon discovery of this mistake, as appears, the parties to the mortgage executed and caused to be recorded an instrument setting forth said mistake, providing and covenanting therein that the original mortgage was corrected thereby in the particular mentioned, by substituting the word "east" for the word "west," as written in the original mortgage, in respect to the seventeen and one-half feet of lot 16. But in the mean time the erection of the opera-house on said premises had been commenced.

The facts relative to the alleged mistake, and the reformation thereof by the parties to the mortgage, are set forth in the complaint, accompanied with a prayer that the mortgage, as voluntarily reformed by the parties thereto, be held precedent to the lien claim of appellant accruing through furnishing labor or material for said building, in so far as it related to the seventeen and one-half feet of the east side of said lot 16, as well as the rest of said premises. Appellant, by answer, contested plaintiff's right to such relief, but does not deny the facts alleged in regard to said mistake and the voluntary correction thereof by the parties. The evidence introduced on the trial in relation to this point in controversy is not here

for our review. So far as shown, this mistake was so circumstanced as to be quite palpable to any one coming into such relation to the property as the parties to this action afterwards sustained. Besides, there may have been legitimately shown in evidence facts and circumstances in reference to the knowledge and understanding of the parties contracting to erect the building or furnish material therefor which would have aided the trial court in reaching the conclusion that those who became lien claimants were in no wise misled to their injury by reason of said mistake. In short, it may have been shown that the lien claimants understood, as well as the proprietor contracting for the erection of said building, that the mortgage covered the premises on which the same was erected. It was certainly pertinent to show in evidence the relations and understanding of the parties in reference to this subject. We do not hold that such a correction in a mortgage would, under all circumstances, be sustained as against liens having their inception prior to the correction; but in this case, as the same is here presented, there is no showing to warrant our disturbing the finding and ruling of the trial court on that point.

The main question presented for our determination by this appeal relates to the ascertainment and determination of the relative rights of a lien claimant in and to the improvement alone, as against the holder of a prior existing mortgage on the land whereon the improvement was erected, and as to the right of severance of the improvement from the land by the lien claimant, as against the right of such prior mortgagee, under the provisions of our statute in that regard.

Having passed beyond the point as to correction of said mistake in the mortgage, we have here a case wherein plaintiff is mortgagee of the premises, under a mortgage executed and delivered to secure payment of seventeen thousand dollars and interest, evidenced by promissory note, which mortgage was recorded prior to the commencement of the improvement on the same premises. After execution, delivery, and recording of the mortgage, the mortgagor undertook the erection of an opera-house on said premises of large dimensions, involving great cost. Through the construction of said building, certain

claims arose in favor of parties furnishing labor and material therefor, which claims, by compliance with the provisions of the statute, were applied as liens thereon. These liens were in due course foreclosed by action against the proprietor of said premises and building, in which action, however, plaintiff, as holder of the prior mortgage, was not joined as a party. Under a decree foreclosing such liens, all right, title, and interest of the mortgagor and proprietor in the premises—both building and land—were sold, and purchased by such lien claimants, through which sale, after several redemptions by lien claimants, in order of succession, appellant succeeded to the rights of such lienors and their certificates of sale under their foreclosure decrees, respectively, and, by virtue thereof, obtained deed of all right, title, and interest of the proprietor in and to the premises, subject, of course, to the mortgage existing on the land prior to the accruing of the lien claims through the erection of said improvement. Thereafter, this action was instituted by said mortgagee to foreclose its mortgage, wherein appellant, being made a party, by his answer sets up the acquirement of title by foreclosure and sale of the improvement and of the proprietor's interest in the land, to enforce said liens, and seeks to have the mortgage restricted, by decree foreclosing it, to the land alone, and make available to appellant said improvement as security for payment of labor and material involved in the erection thereof.

The trial court held defendant's right and title in said premises, acquired through said liens, both as to the improvement as well as the land, subsequent and subject to the mortgage of respondent. Appellant complains of this as being contrary to the provisions of the statute applicable to the facts shown by the pleadings and findings, and by this appeal brings into consideration the question whether the decree of the trial court, in view of the provisions of the statute on the subject and the facts shown, has properly adjusted and preserved the rights of these parties in and to said premises. In short, the question is whether, under such conditions, the holder of the deed obtained through sale of the proprietor's interest in the premises under foreclosure of the lien on the building, as well as all right, title, and interest of the proprietor in the land, may, as

against the holder of the prior mortgage, when such mortgage is foreclosed, be allowed to sever the improvement from the land.

At this point it is well to bring into view the statute bearing upon this subject. The liens through which appellant claims the entire right to said building, precedent to any right or claim of the mortgagee therein, are provided for by chapter 82 of the Compiled Statutes, to protect those furnishing material or labor for erection of improvements on land; and, touching the point here under consideration, it is provided in that statute that the lien shall extend to the entire interest of the proprietor to the extent of one acre of land, if outside of a city or town, and, if within a city or town, to the entire lot on which the improvement is made; and section 1375 provides that, when the interest owned in such land by the proprietor "is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent, or noncompliance with any of the other stipulations therein, shall not forfeit or impair such lien so far as concerns the buildings, erections, and improvements thereon put by such owner or proprietor charged with such lien, but such building, erection, or improvement may be sold to satisfy said lien, and be removed within twenty days after the sale thereof, by the purchaser." This section, although not the one particularly relied on by appellant, is pointed to as showing that the tendency and spirit of the law is to hold the improvements subject to the lien, even to severance from the soil, if need be, as against rights therein superior to the right of the proprietor who caused the improvement to be made, in order to secure payment for the labor or material used in the erection thereof. But section 1376 is particularly relied on by appellant, and reads as follows: "The liens aforesaid for work shall attach to the buildings, erections, or improvements for which they were furnished, or the work was done, in preference to any prior lien, or encumbrance, or mortgage upon the land upon which said buildings, erections, or improvements have been erected or put; and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." This

provision subjects the improvements to the claim of the lienor to secure payment for the labor or material used in the erection of the improvement, by right superior to that of the prior mortgagee.

Respondents do not dispute that such is the plain intendment of the statute, but contend that in this case the lien claimants lost the right of severance of the improvement, by not claiming the same, and having provision made therefor in the foreclosure and sale of the property under said liens, and thus availing themselves of such right by removal of the building, "within a reasonable time," which should have been fixed, as respondents contend, by the decree foreclosing said liens. In their foreclosure proceedings the lien claimants sought no such provisions, and none were made. Under their foreclosure proceedings they sold the property, both the building and the proprietor's interest in the land, together; and the purchaser thereof allowed the building to remain on said lots for some three years, until the mortgage existing prior to the inception of the liens was brought forward for foreclosure. Thereby, as respondents contend, the lien claimants lost their right of severance and removal of the improvement from the premises. But, with careful consideration of the conditions involved, and the law upon the subject, we are unable to find ground to maintain respondents' view.

By provision of the statute under consideration the improvement, and all right and estate therein, appear to be held aloof from the prior mortgage on the land for protection of the laborer, mechanic, and materialman, until their just claims for labor and material used in the erection and improvement are satisfied; and, to make this provision available to the lienor, the right of removal of the improvement "within a reasonable time" after sale is given. The law not only thus provides, but also attaches such lien to the proprietor's interest in the land. The proprietor has a right of redemption and right of occupancy of the premises until those rights are cut off by foreclosure of the mortgage. The lien claimant, in such a case, by foreclosure and sale, disposes of, and the purchaser succeeds to, not only the improvement, with right given by statute to sever and remove the same from the land, but also to the right of

the proprietor in the land and his right of occupancy thereof, subject, of course, to the mortgage existing thereon prior to the lien. Therefore, having succeeded to the rights of the proprietor in the premises, the lienor would seem to be entitled to remain in possession, with the improvement, until the prior mortgagee, by foreclosure, cuts off that right of possession of the land.

By virtue of statutory provision a lienor's right to the improvement is superior to that of the prior mortgagee, with right of severance and removal of the improvement from the land. But the lien claimant, through foreclosure and sale under his lien, having obtained, not only a right to the building, with right to sever and remove it if not redeemed from such sale under the lien, but having also acquired all right and interest of the proprietor in the land, subject to the prior mortgage, and consequently a right of possession of the land until that right of possession is cut off by foreclosure of the mortgage, it would seem that there is no ground to require such purchaser under the lien to move out of possession, with the improvement, until his right of possession is cut off by foreclosure of the prior mortgage. If he is required to straightway remove the building he would still be at liberty to return and occupy the premises, because he has the proprietor's right of possession and use of the land until the prior mortgage is foreclosed.

We are satisfied that the lienor in such a case ought not to remove the building until the period for redemption allowed by law to the proprietor, as well as the mortgagee (who, as to the improvement, may undoubtedly claim that all the proprietor's estate therein inures to his mortgage, subject to the lien claim), has expired. But after that period for redemption expires, how do the parties stand in relation to the premises? The purchaser under the lien foreclosure has acquired right to the improvement, with right to sever the same from the land, as between himself and the prior mortgagee, and also has acquired the right of possession of the proprietor in the land, until cut off by foreclosure of the mortgage. Considering these rights and relations of such parties it would seem reasonably to follow that, until the right of possession of the pur-

chaser is cut off through foreclosure proceedings, he has the proprietor's right of redemption, and ought to be allowed to stay there with his building, and redeem from the sale under the mortgage, if he can, and thus avoid removal of the building under such lien; but, if he does not see fit to take advantage of the right of redemption from the mortgage, his possession ought to give way at the point where the proprietor's right of possession would have ceased; and, his right to the building being superior to the prior mortgage, it would seem that the reasonable time within which the purchaser under the lien foreclosure should remove the building would be prior to the time when he must yield possession of the land to the mortgagee under his foreclosure proceedings. We find no other reasonable solution of the problem presented by this case, and this seems to be entirely reasonable and just, and in conformity with the provisions of the statute and the rights of the parties in the premises.

There was some argument questioning the policy of allowing the removal of a building in such a case, where the removal —as, for instance, of a brick or stone building—would involve great loss. It is a right given by statute which is here being enforced, and, although there would be some loss and expense attending the removal of such improvements, there can be no doubt that the material prepared for use in the building would be of considerable value. Even if there is some loss involved in the removal, is not justice better subserved by allowing the improvement to be taken to satisfy unpaid demands for labor and material used in the erection thereof, than that the same should go without recompense, and the improvement fall to the prior mortgagee, without satisfaction for the labor and material used in the erection thereof? In such a case there is preserved to the mortgagee all that his mortgage covered when the same was given. He, therefore, can hardly find ground for complaint. He also, as one interested in the property, is allowed the privilege to redeem from the lien claim and the foreclosure and sale thereunder, and hold the improvement subject to his mortgage. Moreover, the circumstances give him another advantage. He may at last buy the improvement from the purchaser under the lien, very likely for a

price far below its actual value, on account of the loss and expense attending its removal. But the demands of justice would seem to point in the very direction marked out by statute in such a case, by providing that the lien claimant shall not be compelled to relinquish the improvement to the prior mortgagee or proprietor without recompense.

Appellant urges the further point that the counsel fees awarded for prosecuting the action to foreclose the mortgage are greater than the evidence warranted, and that the manner of inquiry pursued in adducing testimony on that point is not proper. The amount awarded is below five per cent of the demand secured by the mortgage. The testimony was to the effect that double the amount allowed would be reasonable. This testimony was elicited by counsel stating to witness, who was shown to be an attorney at law of ability and experience, the character of the case at bar, the amount involved, etc., and thereupon the witness stated what would be a reasonable fee to allow counsel for prosecuting the action. We agree with appellant's counsel that in such an inquiry it would be proper to ask the witness for what compensation a competent lawyer could be procured to prosecute such an action on behalf of his own client. But this might be done on cross-examination, and the court put into possession of testimony elicited from that point of view. This does not appear to have been done, nor was any testimony of that character excluded, so far as shown by the record. We also concur in the argument of appellant's counsel that in such cases courts should see to it that no exorbitant compensation is awarded to fall upon an already heavily burdened debtor, or upon redemptioners of the property in question. At the same time it is proper to consider that able counsel, called upon to so shape proceedings in court that good title may be thereby acquired to property of great value, should receive compensation adequate to such service. In this case the property is admitted to be of great value, and therefore great care and skill would naturally be desired to avoid loss by reason of defect in the proceedings, and the compensation adequate to that character of service and ability is no doubt proper. It is worthy of observation that the mortgage loan involved in this case, in cold cash, would, in the

period of six months, accrue, by way of interest at stipulated rate, as much as the counsel were awarded for services in these proceedings. Altogether, we do not consider that in this case the award exceeds what would be just and proper, in view of the amount involved, and the fact that the case has gone to the appellate court, and must return for further proceedings in the trial court.

The judgment must be modified so as to provide in favor of appellant or his representatives the privilege of removing said improvement in case he does not see fit to redeem the premises from the mortgage encumbrance resting upon the land, and that such right of removal must be exercised within the time allowed by law for such redemption, and in such manner and with such care as to work no unnecessary injury to said land or other appurtenances thereunto belonging, to the end that the purchaser under the mortgage foreclosure may be let into possession, as provided by law. An order will therefore be entered reversing the judgment, with directions to the trial court to set aside the former sale, and proceed in the case according to the views herein expressed.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

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THAMLING, RESPONDENT, v. DUFFEY, APPELLANT.

[Submitted July 3, 1894. Decided July 16, 1894.]

PROMISSORY NOTE—*Fraud—Defense—Burden of proof.*—A plea of fraud in the inception of a promissory note constitutes a *prima facie* defense to an action by an indorsee against the maker, and places upon the plaintiff the burden of proving, and therefore of pleading, *bona fides*, which includes a want of knowledge of the alleged fraud.

Appeal from Sixth Judicial District, Meagher County.

ACTION on promissory note. Judgment on the pleadings was rendered for the plaintiff below by HENRY, J. Reversed.

Thompson & Maddox, for Appellant.

The complaint states enough to show that plaintiff has the bare legal title to the note in suit, but makes no attempt to

allege that he is a *bona fide* holder, for value, without notice of the defects pleaded in the answer, or that he took it in the regular course of business, the only allegation connecting plaintiff with the note being that the payees "indorsed the same to plaintiff." The complaint is not, therefore, sufficient to let in evidence upon the part of plaintiff of his good faith or want of notice. (*Bunting* v. *Mick*, 5 Ind. App. 289; *First Nat. Bank* v. *Ruhl*, 122 Ind. 279.) The rule is well established that upon it being shown that a note sued upon by an indorsee was obtained through fraud, its character as an original obligation is destroyed, and plaintiff must recover, if at all, not upon defendant's contract, but upon something in the nature of an estoppel, founded upon his purchase of the note before maturity, in the regular course of business, for a valuable consideration, in good faith, without notice of the fraud in its inception. His rights resting upon facts other than the execution and delivery of the note, it is incumbent upon plaintiff to allege and prove those facts. The fraud set up in this answer would be sufficient to render the note void, unless in the hands of one who purchased it for value, in the regular course of business, before maturity, in good faith and without notice of its fraudulent inception. These allegations of the answer stand admitted, the denials thereof contained in the replication being frivolous. (Comp. Laws, § 89, p. 82; *Hammer* v. *Edwards*, 3 Mont. 187.) The following authorities, among others, hold that the plaintiff has the burden of proof in such circumstances: Bliss on Code Pleading, § 395; *Beltzhoover* v. *Blackstock*, 3 Watts, 20; 27 Am. Dec. 330; *Lamb* v. *Burke*, 132 Pa. St. 413; *Vosburgh* v. *Diefendorf*, 119 N. Y. 357; 16 Am. St. Rep. 836; *Canajoharie Nat. Bank* v. *Diefendorf*, 123 N. Y. 191; *Stewart* v. *Lansing*, 104 U. S. 510; *Giberson* v. *Jolley*, 120 Ind. 301; *First Nat. Bank* v. *Skeen*, 29 Mo. App. 115; *Suiter* v. *Park Nat. Bank*, 35 Neb. 372; *United States Nat. Bank* v. *Crosley*, 86 Iowa, 633. It is an elementary rule of pleading that the party upon whom rests the burden of proving a certain fact must plead that fact. It was therefore incumbent upon plaintiff to plead good faith, etc., in reply to defendant's allegations of fraud in the inception of the note before he could recover.

(18 Am. & Eng. Ency. of Law, 469; Moak's Van Santvoords Pleadings, 394–564, and cases cited; Bliss on Code Pleading, § 395; *Bunting* v. *Mick*, 5 Ind. App. 289; *First Nat. Bank* v. *Ruhl*, 122 Ind. 279; *Weaver* v. *Barden*, 49 N. Y. 298.) The only allegations of good faith, etc., being found in the replication, and these being by authority of the statute deemed controverted, there was an issue to try, and the court should not have given judgment upon the pleadings.

Smith & Gormley, and *Waterman & Callaway*, for Respondent.

The case of *Stewart* v. *Lansing*, 104 U. S. 510, is cited by appellant in support of the proposition that "fraud set up in the answer would be sufficient to render the note void, unless in the hands of one who purchased it for value, in the regular course of business, before maturity, in good faith, and without notice of its fraudulent inception," and that the burden of proving these various matters of good faith would thereby be cast upon the plaintiff. The case fails to bear out the proposition, as will appear from the language of the court on the point in question: "It is an elementary rule that if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper, under such circumstances, is not enough." Under this authority, therefore, admitting that defendant's answer sufficiently charged fraud in the inception of the instrument, the plaintiff would simply be required to prove that he was a holder for value. But by the complaint and answer in the case at bar it appears that the plaintiff was a holder for value. The note sued on, as shown by complaint, is negotiable. The complaint then avers "that prior to the maturity of said note, and on, to wit, on or about the first day of April, 1893, the said Hatch Bros. & Co. indorsed the same to the plaintiff." The complaint, therefore, shows: 1. That the plaintiff took the note before maturity; and 2. That the note was indorsed to plaintiff. Now, the term "indorsed," when applied to a negotiable instrument, includes delivery for value to the indorsee. (1 Daniel on Negotiable Instruments, § 667; *Davis* v. *Travis*, 98 Mass. 222;

for our review. So far as shown, this mistake was so circumstanced as to be quite palpable to any one coming into such relation to the property as the parties to this action afterwards sustained. Besides, there may have been legitimately shown in evidence facts and circumstances in reference to the knowledge and understanding of the parties contracting to erect the building or furnish material therefor which would have aided the trial court in reaching the conclusion that those who became lien claimants were in no wise misled to their injury by reason of said mistake. In short, it may have been shown that the lien claimants understood, as well as the proprietor contracting for the erection of said building, that the mortgage covered the premises on which the same was erected. It was certainly pertinent to show in evidence the relations and understanding of the parties in reference to this subject. We do not hold that such a correction in a mortgage would, under all circumstances, be sustained as against liens having their inception prior to the correction; but in this case, as the same is here presented, there is no showing to warrant our disturbing the finding and ruling of the trial court on that point.

The main question presented for our determination by this appeal relates to the ascertainment and determination of the relative rights of a lien claimant in and to the improvement alone, as against the holder of a prior existing mortgage on the land whereon the improvement was erected, and as to the right of severance of the improvement from the land by the lien claimant, as against the right of such prior mortgagee, under the provisions of our statute in that regard.

Having passed beyond the point as to correction of said mistake in the mortgage, we have here a case wherein plaintiff is mortgagee of the premises, under a mortgage executed and delivered to secure payment of seventeen thousand dollars and interest, evidenced by promissory note, which mortgage was recorded prior to the commencement of the improvement on the same premises. After execution, delivery, and recording of the mortgage, the mortgagor undertook the erection of an opera-house on said premises of large dimensions, involving great cost. Through the construction of said building, certain

claims arose in favor of parties furnishing labor and material therefor, which claims, by compliance with the provisions of the statute, were applied as liens thereon. These liens were in due course foreclosed by action against the proprietor of said premises and building, in which action, however, plaintiff, as holder of the prior mortgage, was not joined as a party. Under a decree foreclosing such liens, all right, title, and interest of the mortgagor and proprietor in the premises—both building and land—were sold, and purchased by such lien claimants, through which sale, after several redemptions by lien claimants, in order of succession, appellant succeeded to the rights of such lienors and their certificates of sale under their foreclosure decrees, respectively, and, by virtue thereof, obtained deed of all right, title, and interest of the proprietor in and to the premises, subject, of course, to the mortgage existing on the land prior to the accruing of the lien claims through the erection of said improvement. Thereafter, this action was instituted by said mortgagee to foreclose its mortgage, wherein appellant, being made a party, by his answer sets up the acquirement of title by foreclosure and sale of the improvement and of the proprietor's interest in the land, to enforce said liens, and seeks to have the mortgage restricted, by decree foreclosing it, to the land alone, and make available to appellant said improvement as security for payment of labor and material involved in the erection thereof.

The trial court held defendant's right and title in said premises, acquired through said liens, both as to the improvement as well as the land, subsequent and subject to the mortgage of respondent. Appellant complains of this as being contrary to the provisions of the statute applicable to the facts shown by the pleadings and findings, and by this appeal brings into consideration the question whether the decree of the trial court, in view of the provisions of the statute on the subject and the facts shown, has properly adjusted and preserved the rights of these parties in and to said premises. In short, the question is whether, under such conditions, the holder of the deed obtained through sale of the proprietor's interest in the premises under foreclosure of the lien on the building, as well as all right, title, and interest of the proprietor in the land, may, as

knowledge thereof at the time of the indorsement of said note to him. It is not denied that the fraud alleged in the inception of the note would defeat a recovery thereon in an action by the original holders. The plaintiff filed a replication denying any knowledge of the fraud alleged in the answer. After filing said replication, the plaintiff moved the court for a judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. This motion was sustained by the court, and judgment rendered in favor of the plaintiff for the amount of said note and interest. From this judgment this appeal is prosecuted.

The question presented by this appeal is, Was it essential to the sufficiency of the answer that it should allege that plaintiff had knowledge of the fraud alleged in the inception of said note at the time it was indorsed by him? In other words, did the allegation of fraud in the inception of the note, contained in the answer, place the burden of proof of *bona fides* upon the plaintiff, or was the defendant required to allege and prove knowledge of such fraud on the part of plaintiff at the time the note was indorsed to him?

Mr. Bliss, in his work on Code Pleading (2d ed., § 395), says: "In an action upon negotiable paper the defendant may plead fraud or illegality, or that the bill or note was lost or stolen; and it is well settled that in showing such fraud, etc., he makes a good *prima facie* defense, and that the plaintiff must show affirmatively that he is a *bona fide* holder for value. But, in such case, how should the issue be made on paper? Upon principle, every pleader who, in submitting evidence, holds the affirmative of an issue, must plead the facts upon which the issue is made. It is, however, common in pleading fraud, illegality, or other matter going to the validity of a bill or note in the hands of an indorsee, to also aver a want of consideration, and to charge notice. Is this averment necessary? Is it sufficient for the plaintiff to traverse it if made, or should he affirmatively allege the facts he is required to prove? I do not find these questions settled upon authority. In the analogous cases of a bill to enforce an equity against one who has obtained the legal title, whether to land or chattels, it is sufficient for the plaintiff to show the equity; he thereby makes

a *prima facie* case against the world. A purchaser for consideration without notice will, however, be protected. In his plea or answer the purchaser of land must aver expressly that the person who conveyed was seised, or pretended to be seised, when he executed the conveyance, and that he was in possession, must state consideration, and its actual payment, and must deny notice, whether it has been averred by the opposite party or not. The purchaser of stock, if he would defend against a plaintiff's *prima facie* title, must affirmatively state in his answer, and must prove the facts showing that he was a *bona fide* purchaser for value. In the matter under consideration the plaintiff, after the defendant's showing, can only protect himself by his relation to the paper. In itself it is good for nothing, but when one has put his name to a negotiable instrument the law merchant, for commercial reasons, will protect the innocent holder, the person who has obtained it in good faith and for value. As we have seen, he must prove that he has obtained it, as must the holder of a legal title to property as against the holder of an equity. It would seem, both from analogy and upon principle, that he should be required to affirmatively plead the facts that thus protect him, which he is required to prove, and that the allegation of notice, etc., in the answer is unnecessary." (And see authorities cited.)

In *Vosburgh* v. *Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, a case involving the doctrine involved in the case at bar, the court says: "The learned counsel for the plaintiff contends that in this case the burden of proving notice to the plaintiff of the facts connected with the execution of the note, and of the fraud, if any, was upon the defendant, and that, in the absence of such proof by the defendant, the plaintiff was entitled to recover. We think that this proposition cannot be maintained. Doubtless some support may be found for it in certain elementary books, and in some of the adjudged cases in other states. But in this state it must be regarded now as a settled rule that, when the maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser. (*First Nat. Bank* v. *Green*, 43 N. Y. 298; *Farmers' etc. Bank* v. *Noxon*, 45 N. Y. 762;

Ocean Nat. Bank v. *Carll*, 55 N. Y. 440; *Wilson* v. *Rocke*, 58 N. Y. 643; *Grocers' Bank* v. *Penfield*, 69 N. Y. 502; 25 Am. Rep. 221; *Nickerson* v. *Ruger*, 76 N. Y. 279; *Seymour* v. *McKinstry*, 106 N. Y. 240; *Stewart* v. *Lansing*, 104 U. S. 505; *Smith* v. *Livingston*, 111 Mass. 342; *Sullivan* v. *Langley*, 120 Mass. 437.) The plaintiff did not satisfy this rule by showing that he paid value for the note; it was necessary, in order to entitle him to recover, to go further, and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin."

In *Canajoharie Nat. Bank* v. *Diefendorf*, 123 N. Y. 191, a recent and well-considered case, the court of appeals of New York say: "The plaintiff claims that the proof showing it purchased the notes before maturity, paying value therefor, conclusively establishes its character as a *bona fide* holder, and entitles it to recover, in the absence of proof showing that it had notice or knowledge of facts constituting a defense to the action. The plaintiff's contention eliminates the element of good faith from the transaction, and assumes that the language, 'a holder for value,' as used in the authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this state, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account, with other facts, in determining the question of the *bona fides* of the transaction, and, when full value is paid, is entitled to great weight; but that fact is never conclusive, except in the absence of evidence tending to show notice of bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills and negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a *bona fide* holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. This has been the law in this state since the case of *Bay* v. *Coddington*, 5 Johns. Ch. 54; 20

Johns. 637. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction; but where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go further, and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books; and, while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of the character claimed to be protected. (1 Parsons on Notes and Bills, 258.) . . . . A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the state hold that, upon proof by the defendant that his obligations have been fraudulently or illegally obtained, and put in circulation, the person seeking to recover upon them must show, not only that he bought before maturity and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference, in the question presented, whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumptions of *bona fides* which accompany the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or, as in this case, he makes the proof of such circumstances as part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a *bona fide*

holder, in a case where the proof shows that the paper has been fraudulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and, when this is done, the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith. The question of law involved in this case was considered in the case of *Vosburg* v. *Diefendorf*, 119 N. Y. 360, 23 N. E. Rep. 801, and there received the unanimous approval of the court."

In *Stewart* v. *Lansing*, 104 U. S. 505, Mr. Chief Justice Waite, speaking for the court says: "It is an elementary rule that, if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover, must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough. (*Smith* v. *Sac Co.*, 11 Wall. 139.) Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover."

It cannot be said that the authorities are uniform or harmonious upon the questions involved in this case. But we are of the opinion that the authorities cited contain the better and sounder reason on the questions involved. It might frequently occur that a defendant in such a case would be powerless to allege or prove knowledge in the plaintiff of the fraud which tainted the note sued on, at its inception—this knowledge being peculiarly within the breast and possession of the plaintiff—whereas it would very rarely be a hardship upon an indorsee to require him to show his *bona fides* by proving the circumstances and facts under which he became the owner and holder of the paper on which he sues. From the foregoing authorities and consideration we are of the opinion that the allegation of fraud in the inception of the note sued on, contained in the answer, contained a *prima facie* defense, and placed the burden of proving *bona fides*, which includes a want of knowledge of the fraud alleged, upon the plaintiff in this case; and, if so, the burden of pleading such want of knowledge was upon him, necessarily. It therefore follows

that the action of the trial court in rendering judgment on the pleadings was error.

The judgment is reversed, and the cause remanded for trial.

Reversed.

HARWOOD, J., and DE WITT, J., concurred:

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STATE EX REL. NEW YORK SHEEP COMPANY v. EIGHTH JUDICIAL DISTRICT COURT.

[Submitted July 2, 1894. Decided July 19, 1894.]

RECEIVER—*Jurisdiction to appoint—Attaching creditor.*—Under subdivision 1 of section 229 of the Code of Civil Procedure, authorizing the appointment of a receiver in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property to his claim, or between partners or others jointly interested in any property, on application of the plaintiff or of any party whose interest in the property is probable, and where the property or fund is in danger of being lost or materially injured, the district court has no jurisdiction, in actions for debt in which the debtor's property has been attached, to appoint a receiver of the property so attached, on the application of a junior attaching creditor, though it appears that the property may be lost or materially injured if left in the hands of the sheriff. Nor would the court in such case possess jurisdiction to appoint a receiver under subdivision 6 of said section 229, authorizing such appointment "in all other cases where receivers have been heretofore appointed by the usages of courts of equity." (HARWOOD, J., dissenting.)

SAME—*Same—Statutory construction.*—An action for debt in which the defendant's property has been attached is not an action by a creditor to subject any property or fund to his claim, nor is it an action between persons jointly interested in any property or fund, and is therefore not within subdivision 1 of section 229 of the Code of Civil Procedure, authorizing the appointment of a receiver in the cases stated where the property or fund is in danger of being lost or materially injured. (HARWOOD, J., dissenting.)

SAME—*Statutory construction.*—The kinds of action in which a receiver may be appointed under subdivision 1 of section 229 of the Code of Civil Procedure are limited to an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property to his claim, or between partners or others jointly interested in any property, and the concluding language of the provision, "on the application of the plaintiff or of any party whose right or interest in the property is probable, and where the property is in danger of being lost or materially injured," cannot be construed as creating new cases for a receiver, but merely provides on whose application, and under what circumstances, the appointment may be made in the cases already enumerated.

ORIGINAL PROCEEDING. Application for writ of *certiorari* to review action of the eighth judicial district court in appointing a receiver of relator's property held under writs of attachment. Writ granted.

Statement of the case prepared by the justice delivering the opinion:

This court is asked to review, upon writ of *certiorari*, the appointment of a receiver by the district court. The facts upon which the application for writ of *certiorari* is made are as follows: On May 31, 1894, in the eighth judicial district court for Cascade county, L. G. Phelps commenced an action against the New York Sheep Company, the relator herein, to recover the two sums of seven thousand three hundred and three dollars and nine cents and five thousand dollars, and interest. On the same day the Severance Mercantile Company commenced an action against the same defendant to recover five thousand nine hundred and thirty-five dollars and twenty-four cents. Two writs of attachment were issued in each case, one to O'Marr, sheriff of Meagher county, and one to Deaton, sheriff of Fergus county. The two sheriffs each levied upon a large band of sheep belonging to the defendant, and in their respective counties. Under each writ, in the hands of each sheriff, the Phelps levy was first, and prior to the levy of the Severance Mercantile Company. Afterwards, the Severance Mercantile Company filed a complaint in the eighth judicial district court against the two sheriffs, O'Marr and Deaton, and Phelps and the New York Sheep Company. That complaint set up the facts above recited, and then stated facts tending to show that the attached property was in danger of being lost or materially injured if it remained in the hands of these two sheriffs. The Severance Mercantile Company asked in that complaint for the appointment of a receiver of the sheep attached, as above described. That appointment was made by the district court. That action by the district court the New York Sheep Company now asks us to review on *certiorari*, claiming that the court had no jurisdiction or power to make the appointment.

Thompson & Maddox, for Relator.

The suit of the Severance Mercantile Company against the relator herein, and others, is a suit brought for the express and only purpose of obtaining a receiver. No relief other than the appointment of a receiver is sought. The plaintiff in that suit

is not a judgment creditor with an execution unsatisfied against the corporation, but merely an attaching creditor with a second attachment lien upon the property of the corporation. The appointment of a receiver is an equitable remedy. The plaintiff had a complete, speedy, and efficient remedy at law by attachment, and of which legal remedy it had already availed itself at the time of the commencement of the action for a receiver. As authority for the appointment of a receiver plaintiff relied upon the first subdivision of section 229 of the Code of Civil Procedure, providing that "a receiver may be appointed by the court in which an action is pending, or by a judge thereof: First, ... by a creditor to subject any property or fund to his claim." This section clearly requires an action pending, not a direct suit for the appointment of a receiver, but a pending action as ancillary to which the receivership is sought. An action by a creditor to subject any property or fund to his claim is a creditor's bill, in aid of which a receiver may be appointed. But plaintiff's action was a direct suit having for its specific and only purpose the appointment of a receiver. It possesses no attribute or element of a creditor's bill. A creditor's bill may be maintained where relief by execution at law is ineffectual; as for the discovery of assets, to reach equitable interests not subject to levy and sale at law, and to set aside fraudulent conveyances and obstructions. (3 Pomeroy's Equity Jurisprudence, § 1415.) Furthermore, no judgment has been obtained. While it is not always an essential preliminary to a creditor's bill that an execution be returned unsatisfied, it is held as an almost universal rule that a judgment must at least be obtained before the institution of a suit of this character. This case is not within the exceptions to this rule. (4 Am. & Eng. Ency. of Law, 574, 575, and cases cited in note 1.) It is clear that plaintiff's case does not come within any of the first five subdivisions of section 229. The sixth subdivision permits the appointment of a receiver "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." It has been within the usages of courts of equity to appoint receivers of the property of corporations in suits prosecuted by private parties. (*French Bank case*, 53 Cal. 550.) The appointment of a receiver is an

equitable remedy, purely ancillary and provisional, and bears the same relation to courts of equity that proceedings in attachment bear to courts of law. That there must be an action pending seeking some specific relief to which the appointment of a receiver is merely ancillary would seem too clear to require the citation of authority. A glance at the complaint upon which the receiver was appointed in this case suffices to disclose that the plaintiff seeks no relief, either legal or equitable, against the relator, or any of the defendants in that suit. No facts are pleaded upon which a judgment of any character or description could be rendered against the defendants therein or either of them. There being no "action pending" in the eighth judicial district court "by a creditor to subject any property or fund to his claim," or an action of any other nature, the appointment of a receiver of the property of relator by that court was an excess of jurisdiction, and for that reason the order should be annulled. (*Jones* v. *Bank of Leadville*, 10 Col. 473.)

Toole & Wallace, for Respondent.

The district court having jurisdiction in "all cases at law and in equity" (Const., art. VIII, § 11), it follows that the only question for consideration on this writ is whether this action was of the character defined by section 229 of the Code of Civil Procedure. This section is divided into six subdivisions, of which the sixth has been decided by the California courts to be useless, because their constitutional provision like ours gives jurisdiction in all cases in equity. (*Bateman* v. *Superior Court*, 54 Cal. 285–88.) The same case likewise determined that this subdivision is limited alone to cases of an equitable nature. But they further expressly declare that the other five subdivisions, with the possible exception of the fifth which was held meaningless in the *French Bank case*, 53 Cal. 495, confer enlarged additional powers on the court, and empower it to appoint a receiver in any actions falling within their classification whether they be actions at law or in equity. That the statute has greatly enlarged the power of the court and extended it to legal as well as equitable actions, is also announced in *John L. Roper Lumber Co.* v. *Wallace*, 93 N. C.

22–27. By the words "action pending," as used in section 229, which declares that a receiver may be appointed by the court in which an action is pending, is meant simply that a complaint must be on file in the court. (*Merchants' etc. Bank* v. *Kent*, 43 Mich. 295; *Baker* v. *Backus*, 32 Ill. 98.) Here there were three actions pending; two actions at law by Phelps and the Mercantile Company. In New York, where the statute required the application to be made upon petition, and instead of a petition a second complaint was filed, the court said: "That being filed in the same court in which the former suit was pending, the second complaint would be treated as a petition to the same court, and would be so regarded." (*Morgan* v. *New York etc. R. R. Co.*, 10 Paige, 293; 40 Am. Dec. 244.) And so if the action at law by Phelps, with its ancillary attachment of property, would be of such a nature that in it the court might exercise the power of appointment. this third complaint, filed by the Mercantile Company against the plaintiff and defendant in that suit and the officers who levied the process therein would, if necessary, be deemed a petition in that action addressed to the same court. As to the nature of these actions, we insist: 1. That even were there no statute in existence, such as section 229, yet the third complaint develops an equitable action of such a nature as that under the constitutional power, and in accordance with rules of equity the appointment was authorized; 2. That any of the three actions so pending are of the kind referred to in subdivision 1 of section 229. And, unless both of the above propositions are determined adversely this writ must be denied. It becomes material at the outset to inquire as to the nature—whether legal or equitable—of the interest acquired by us by this second levy, because if equitable, then possibly plaintiff could not come into an action at law then pending between others, to enforce or protect a right purely equitable; and in such event the third suit was not only proper, but necessary. "Whatever interest defendant has in the property seized, whether it be legal or equitable in its nature, is all the lien affects." (Wade on Attachment, § 30.) Here the Phelps levies had attached as a lien to this property, and was an existing lien when plaintiff's levy was made; so it is clear our levy

only took hold of the equitable interest of the relator, remaining after the property has satisfied Phelps' claim. Discussing the question of the old chancery practice, in the absence of statutory powers, as to the right of a court at the instance of a creditor, other than a judgment creditor to appoint a receiver, Mr. Pomeroy, in 3 Pomeroy's Equity Jurisprudence, section 1334 says: "In suits by creditors, although not strictly creditors, actions by judgment creditors, brought to enforce their demand from their debtors' property, under some very special circumstances, involving great danger of loss, such as the debtors' nonresidence and the like." While Mr. Beach, in his work on Equity Practice, just published (sec. 719), speaking of the property over which, by the same practice, a receiver might be appointed, says: "The property a receiver is most commonly appointed to take charge of is, first, property levied on by attachment or execution, and liable to perish or deteriorate pending the suit." These are late works, and evidence a broadening of the old doctrine, legitimately growing out of the principle on which it was founded. The old general principle of chancery, denying relief to other than judgment creditors, rested on the idea that they must have a specific lien in the particular property they sought to thus protect, and as attachments were then unknown, this could only be acquired by a creditor after judgment. Says High, in his work on Receivers, section 406: "Courts of equity will not permit any interference with the right of the citizen to control his own property, at the suit of creditors, who have acquired no lien thereon, and whatever embarrassments the creditor may experience by reason of the slow procedure of the courts of law must be remedied by legislative, not by judicial, authority." Our legislature has done so by section 229. But this general doctrine was, even in the early periods, subject to exceptions growing out of peril to the property, thus imperiling the satisfaction of the creditor's claim. (High on Receivers, § 476, p. 278, note 2.) Where a creditor acquired a specific lien, he was before judgment, in the absence of any statute, granted a receiver, on showing that otherwise his lien was in peril. (High on Receivers, § 408.) So in an action by her general creditors to charge a sole trader's assets where there was a dan-

ger of the assets being wasted or put beyond the reach of creditors. (*Todd* v. *Lee*, 15 Wis. 365.) Speaking of the above case, Mr. High says: "Such a proceeding, it is held, bears a close resemblance to a creditor's bill for the enforcement of a judgment, and there would be no impropriety in granting an injunction and a receiver upon the same grounds as in cases of creditors' bills." (High on Receivers, § 409.) "If a creditor has a lien or charge upon the property of the debtor, even though his demand may not be reduced to judgment, he occupies a different relation from that of a mere contract creditor, and may properly invoke the preventive powers of the court for his protection." (High on Injunctions, § 1404.) "What we have above quoted from books of the highest authority proves two propositions: 1. That in case of pressing emergency a court may appoint a receiver before answer filed; and 2. A receiver may be appointed wherever the complainant has a lien, or a specific right to have the property or funds in controversy applied to the payment of his claim." (*Weis* v. *Goetter*, 72 Ala. 261.) That the old chancery doctrine was based on the lien on specific property, and the danger of its deterioration or injury is clearly announced in 2 Story's Equity Jurisprudence, §§ 843, 845, 851. Attempted fraud will always be prevented by a court of chancery at the instance of any one about to be injured thereby. So that this single feature in this case, i. e., the intended fraudulent conversion to his own use by the relator of the wool and its proceeds, of itself and alone, regardless of the other grounds presented by the bill, gives the court jurisdiction and power. This third complaint is nothing more or less than a bill *quia timet*, and would have been so termed under the old chancery practice. (2 Story's Equity Jurisprudence, §§ 825–27, 829, 845, 846.) Wherever the element of fraud intervenes courts of equity always have jurisdiction, and will exercise it even though plaintiff has a remedy at law. (*Chautauqua County Bank* v. *White*, 6 N. Y. 236; 57 Am. Dec. 442.) A receiver will be appointed even over the corporation itself, where fraud is shown in the defendant, and the fund is in danger of being wasted or misapplied. (Boone on Corporations, § 172; *Baker* v. *Backus*, 32 Ill. 95; High on Receivers, § 347.) The necessity of notice

before appointment is dispensed with in cases of fraud. (*Sims* v. *Adams*, 78 Ala. 397; *Ashurst* v. *Lehman*, 86 Ala. 371; *Fricker* v. *Peters etc. Co.*, 21 Fla. 254.) So, likewise, as to a showing of speedy danger of loss or lessening value. (*Oil Run Petroleum Co.* v. *Gale*, 6 W. Va. 527, 545.) Continuing heavy expense will even justify appointing without notice. (20 Am. & Eng. Ency. of Law, 26; Beach's Equity Practice, § 730, note 3; *Hendrix* v. *American Freehold etc. Co.*, 95 Ala. 313.) The aid of a receiver is sometimes granted in cases of mines and colleries pending a litigation which is to determine the title and right of the parties, when, from the peculiar nature of the property, it is necessary that it should be kept in operation and preserved *pendente lite*. (High on Receivers, § 615; *Weis* v. *Goetter*, 72 Ala. 259; Tiedemann on Equity Jurisprudence, § 579.) But we are not compelled to rest this question alone upon the general equity powers of the district court, because they have been considerably broadened out by a statutory enactment of this state (Code Civ. Proc., § 229, p. 115), one clause of which reads: "In an action by a creditor to subject any property or fund to his claim," and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Clearly the object of an attachment suit sued out by a creditor in a suit at law upon his debt is to set aside a part of his debtor's property so that this special property shall be subject to the payment of his claim when established by judgment. As an attachment cannot be had except in an action first brought, if, simultaneously with the beginning of a suit, an attachment is sued out and levied, the natural, logical, and legal inference is that the action is brought with a view of subjecting part of his debtor's property to his claim. In interpreting this clause of the statute of its own state the supreme court of Texas has announced that while a mere general creditor would not be within the purview of the clause an attaching creditor would be. (*Carter* v. *Hightower*, 79 Tex. 135.) In a suit brought by mere general creditors, having no liens, to obtain relief and a receiver, the court says: "But no mere outsider, not having an attachment lien himself, can interfere for that purpose." (*State* v. *Superior Court*, 7 Wash. 77.) The foregoing, though negative, cases would seem

to clearly indicate that when a creditor has brought suit on his demand and gotten his writ levied on part of the assets of his debtor, an action is thenceforth pending in that court by a creditor to subject the property or fund to his claim. And in that action therefore, if his right were founded on a first levy, i. e., legal in its nature, the property in danger of being materially injured, he could apply for a receiver. Our lien, however, arising on a second levy and being equitable in its nature, made it necessary to bring the second suit, and in this second action it was proper to make Phelps a party, though admitting the priority of his lien. (*Miltenberger* v. *Logansport etc. R. R. Co.*, 106 U. S. 306.) A further clause of the same subdivision of section 229 reads: "In an action between partners or others jointly owing or interested in the property or fund, on the application of the plaintiff, or any party whose right to or interest in the property or fund, or the proceeds thereof, is probable." It is clear that we come within the operation of this latter clause, being interested with the relator in the property or fund involved in the action.

A. J. Shores, also for Respondent (on rehearing).

Upon an examination of the opinion of this court, heretofore filed, it seems to us that the opinion proceeds upon the theory that if the remedy at law is adequate there is no jurisdiction in equity, and that hence it is competent upon a writ of *certiorari* for this court to examine the complaint filed with a view of ascertaining whether the remedy at law was adequate. This we think is a mistaken view as to the function of the writ of *certiorari*, and involves a fundamental mistake as to what constitutes jurisdiction in a court. We think where a complaint is filed in equity the objection that the remedy at law is adequate, and there is no need for the interference of a court of equity, is merely a matter of defense to the bill, and does not go at all to the jurisdiction of the court to act upon the complaint and determine whether a cause of action was stated that will require an equitable remedy. (*Grignon* v. *Astor*, 2 How. 319; *Hollins* v. *Brierfield Coal etc. Co.*, 150 U. S. 371; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352; *Reynes* v. *Dumont*, 130 U. S. 354; *Kilbourn* v. *Sunder-*

land, 130 U. S. 505.) The true inquiry should be whether, in the case at bar, the court had jurisdiction of the parties and of the general subject matter of the litigation and power in a proper case to grant the relief which it did grant. Upon *certiorari*, under our practice, the question before the court is, Are the proceedings of the court below of such character as to render them null and void and assailable, collaterally? (*McNitt* v. *Turner*, 16 Wall. 352; *Grignon* v. *Astor*, 2 How. 319.) In the case at bar proceedings were regularly instituted in the district court by the filing of a complaint upon the part of the Severance Mercantile Company as plaintiff, against James O'Marr and others as defendants, wherein certain facts were set forth upon which the plaintiff claimed the right to certain relief. The complaint set forth that the plaintiff had acquired a certain interest in specific property therein referred to; that the defendants had or claimed to have certain interests in the same property, and other facts were set forth which, in the opinion of the plaintiff, made it necessary, for the protection of all the parties to the suit, that the court should take possession of the property and appoint a receiver over it, and grant other relief. Now, the subject matter of this application was clearly within the jurisdiction of the court and the parties were before it. It was for that court to determine whether, upon the facts stated, the relief ought to be granted; that is to say, whether a cause of action was stated of equitable cognizance. It might have been objected, and perhaps was objected, upon the application for the appointment of a receiver in the court below, that the facts stated were insufficient. It might have been objected, and probably was objected, that the remedy at law was adequate. But, was it not clearly within the jurisdiction of the district court to pass upon these objections and determine whether they were good or bad? The court may have erred. It may have been of the opinion that the remedy at law was inadequate, and that the case was a proper one for the granting of equitable relief, when, in the opinion of this court, upon the facts stated, no sufficient grounds were assigned for the granting of equitable relief. If the lower court committed an error of this character, such error is not reviewable upon

certiorari, but must be reviewed, if at all, upon appeal. If the law provides no remedy by appeal, then the decision of the district court is final. In the case at bar, if the defendants in the suit had filed their answers consenting to the granting of the relief asked for, including the appointment of a receiver, it can hardly be pretended that the court's action in appointing a receiver would have been in excess of its jurisdiction, nor would any final judgment that it might have rendered in the action, disposing of the rights of the parties to the suit, have been a nullity. Nor would any sale that might have been made by the receiver under the order of the court fail to pass title to the property. Yet, it is a familiar doctrine that consent cannot confer jurisdiction over the subject matter and the validity of the court's judgment and of such a sale could not arise out of the mere consent of the parties to the proceeding. In *Pressley* v. *Lamb*, 105 Ind. 171, it was objected: 1. That the court had no power to entertain the application for the appointment of a receiver in vacation; and 2. That the complaint in the action between the partners in which the receiver was appointed did not show any actual controversy between them and no cause of action, nor any facts justifying the appointment of a receiver. Neither of these objections were sustained. (See, also, *Cook* v. *Citizens' National Bank*, 73 Ind. 256.) We think it has undoubtedly been the practice in this state, from the beginning, to appoint receivers over attached property in cases where, in the opinion of the court, full protection to the interest of all parties concerned made such a proceeding necessary or advisable. It can hardly be held that judgments and decrees heretofore rendered in such proceedings and sales made under them are to be treated as nullities, because upon an examination of the record in such proceedings it might appear to this court that there was no real justification for going into equity; that the remedy at law is adequate. Personal property of great value and much real estate have been sold under judgments and decrees and orders of this character. Are the titles acquired at these sales subject to be held invalid if, upon collateral attack, it should appear that the remedy at law was adequate? That is to say, is the judgment of the district court upon the question as to

whether the remedy at law is adequate, when such question is presented to it in an action regularly instituted in that court, to be held as rendered within its jurisdiction only when it determines the question right? If it commits an error in the opinion of this court in holding that the case presented is a case where the remedy at law is not adequate, can it be held that there was no power or jurisdiction in the lower court to pass upon that question? Or, in other words, can it be held that the district court has no jurisdiction merely because the complaint fails to state a cause of action? The *French Bank case*, 53 Cal. 495, is much relied upon by the relator; but even if the various propositions upon which the court's decision in that case is based could be accepted without modification, it furnishes no precedent for annulling the proceedings in the district court in the case at bar upon *certiorari*. In the French Bank case the court held that the order made in the lower court appointing a receiver of the French Bank had the effect to dissolve the corporation. The court then proceeds to hold that this order of the district court, which it views as in effect dissolving the corporation, should be annulled upon *certiorari*, for the reason that there is no jurisdiction vested in courts of equity to dissolve corporations at the suit of a private person. Now, we may concede that a court of equity has no inherent power to decree the dissolution of a corporation in such a suit; that the matter of dissolving corporations at suit of private parties must be provided for by the legislature, which, of course, may make provisions for such proceedings, to be had either in a court of law or in a court of equity. If no legislation has been had which authorizes a court of equity to dissolve a corporation in such a suit, and if there is no inherent jurisdiction in a court of equity to dissolve corporations, manifestly a judgment or decree of such a court dissolving a corporation at the suit of a private party would be in excess of its jurisdiction, and clearly something to be annulled upon *certiorari*. If a proceeding were instituted in a court of a justice of the peace to dissolve a corporation, and an order or decree or judgment should be entered in such court, the effect of which, if valid, would be to dissolve a corporation, such proceedings would clearly be annulled upon

certiorari, for the same reason that the proceedings would be annulled if had in a court of equity, viz: that neither of such courts has ever had any jurisdiction to grant relief of that character, or to render a judgment of that nature. If, in the case at bar, the order of the district court appointing a receiver over the property covered by the attachments in legal effect dissolved the New York Sheep Company, and if the supreme court of California is right in holding that there is no jurisdiction in equity to dissolve corporations in private suits, clearly the order of the district court appointing a receiver may be annulled upon *certiorari*, for the reason that it is in excess of the jurisdiction of that court. But if this court should be of the opinion and hold that the order of the court below, if sustained, would not operate to dissolve the New York Sheep Company, then the French Bank case cannot be regarded as a precedent for annulling such order upon *certiorari*. That the appointment of a receiver in an equity suit, over the property of a corporation, has no such effect as to dissolve the corporation has been repeatedly adjudged. (*Decker* v. *Gardner*, 124 N. Y. 334; *Kincaid* v. *Dwinelle*, 59 N. Y. 553; *Pringle* v. *Woolworth*, 90 N. Y. 502; Beach on Receivers, § 335; *Ohio etc. Ry. Co.* v. *Russell*, 115 Ill. 52; *State* v. *Merchant*, 37 Ohio St. 251.) If the views advanced above are sound, the questions raised by the relator are not jurisdictional questions. As to relator's argument that the remedy at law was adequate, it may be observed: 1. That there is no ground for assuming that the legislature intended to abridge to any extent the jurisdiction of our courts of equity, or to in any way modify their practice; and 2. That a legislative intent clearly expressed to cut down the equitable jurisdiction of our district courts could not prevail, since such jurisdiction is derived from the constitution, and is not subject to modification at the will of the legislature. The legislature may doubtless add to the remedies now existing. It may also extend old remedies to new cases. It may authorize the appointment of a receiver in a case where the court would not, sitting as a court of equity, in the exercise of its jurisdiction as such, appoint a receiver. But it cannot take away from the district court the power conferred upon it by the constitution, nor has it intended to do so. On the

contrary, after providing for the appointment of receivers in some cases where receivers would not have been appointed by the district court in the exercise of its general equity jurisdiction, the legislature has shown its intention not to abridge or attempt to abridge the power of the court in this regard, by declaring that a receiver may be appointed "in all other cases where receivers have heretofore been appointed by the usages of the courts of equity." (1 Story's Equity Jurisprudence, 13th ed., 69, 89.) It is true that the granting of equitable relief is largely a matter of discretion in the court, and it may be that in the exercise of such discretion a court of equity might refuse to appoint a receiver in a case where it was apparent that the remedy furnished by these statutes was ample and adequate; but the right to appoint a receiver is in no wise limited by these statutory provisions, and in the exercise of its discretion the court might, without error, appoint a receiver to do just what the sheriff is authorized to do by the terms of these acts. Again, the relator has contended that courts of equity have never appointed receivers over property already in the custody of the law under attachment; that is to say, that there is no precedent for the exercise of equitable jurisdiction over such property. In this the relator is mistaken, but even if he were not mistaken it would by no means follow that the action of the lower court was erroneous. The question is whether the principles upon which the equitable relief is granted justify the action of the court, not whether some case exactly similar in its facts can be cited wherein such relief has been granted. In 2 Beach's Modern Equity Practice, page 703, under the head of "Property over which a receiver may be appointed," nine or ten classes are enumerated, the first of which is "Property levied on by attachment or execution, and liable to perish or deteriorate during pendency of suit." The whole of this paragraph is apparently quoted from Gibson's Suits in Chancery, section 844. The propriety of appointing a receiver over such property seems to have been very seldom questioned. It has been done innumerable times by the district courts of this state, and yet this is the first case in this court where any doubt has been suggested as to the correctness of the practice. The principle upon which courts of equity

have acted in appointing receivers over such property is one of the most familiar in equity jurisprudence. Courts have not only appointed receivers over attached property to prevent loss, but have gone much farther, and appointed receivers over property for the purpose of preventing attachments and the loss consequent upon the enforcement of strict legal remedies. Cook, in his work on Stockholders, 3d edition, volume 2, section 863, page 1415, says: "The power of the court to appoint a receiver of a railroad which is in financial difficulties, the purpose of the appointment being to preserve the property and prevent attachments and executions in order that it may be extracted from its financial difficulties, and its old resources or new money made available, seems to be established. Such was the purpose and result of the appointment of a receiver of the Reading Railroad in 1893, and such was the object in the appointment of a receiver of the Central Railroad and Banking Company of Georgia in 1892." The case last referred to is *Clarke* v. *Central R. R. & B. Co.*, 54 Fed. Rep. 556. In the case last cited, the court says, respecting that receivership: "The receivership, as it then existed, constituted a trust of a somewhat unusual but entirely salutary character. It was created, as stated, in an effort to tide over the unpleasant difficulties of vast, valuable, and probably solvent, though badly embarrassed, properties, an embarrassed condition, mainly occasioned by lawful causes." So in the case of the Wabash road, a receiver was appointed for the sole purpose of preventing execution and attachment levies and foreclosures that might be instituted against portions of the property owned by the company; not, of course, with a view to defrauding the creditors, but in order that the whole property might be administered by a court of equity through a receivership, the best possible price realized, and all debts paid in full. (*Wabash etc. Ry. Co.* v. *Central Trust Co.*, 23 Fed. Rep. 513; *Central Trust Co.* v. *Wabash etc. Ry.*, 29 Fed. Rep. 623; *Quincy M. & P. R. R. Co.* v. *Humphreys*, 145 U. S. 82; *St. Louis etc. R. R. Co.* v. *Humphreys*, 145 U. S. 105.) In the cases last cited, receivers were appointed for the purpose of preserving property from probable loss consequent upon the enforcement of ordinary legal remedies, and before suit brought for the

enforcement of such claims. The Wabash case is the best known and most discussed of these cases, and has been subject to a great deal of criticism from divers sources, as an unprecedented and an unwarranted exercise of power by a court of equity. The supreme court of the United States did not in either of the cases above referred to directly pass upon the question whether the lower court committed an error in originally entertaining the proceeding and appointing a receiver over the property of the company. But the action of the supreme court in affirming the orders of the lower court in the administration of the receivership clearly shows that in the opinion of the supreme court there was no lack of jurisdiction in the lower court to do what it did. Whether, if the question had been directly presented to the supreme court it would have sustained the order appointing a receiver or held it error, is not so clear. In the case at bar we do not ask the court to go as far as was done in the Wabash and other cases above cited. The property in which the plaintiff has an interest, or upon which it has acquired a lien, is threatened with dissipation under a prior levy, the time of the application for the appointment of a receiver, other suits were actually pending against the debtor for the enforcement of demands against it, under which its property had been seized. In *Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U. S. 434, the receiver was appointed after the levy of attachments and executions upon various portions of the company's property, and that such appointment was made for the purpose of preserving the property from loss liable to occur through the enforcement of such attachment and execution levies. From the cases above cited it appears that the supreme court of the United States has taken the view: 1. That a court of equity does not exceed its jurisdiction in appointing a receiver over property in anticipation of, and for the purpose of, preventing the same from being seized by attachment and execution, where the character of the property and its situation is such that material loss is likely to result to the parties interested in it if disposed of on attachment and execution sales; 2. That after seizure of such property upon attachment and execution levies a court of equity not only has jurisdiction to appoint a receiver over it

for the purpose of preventing loss, but its action in appointing such receiver will be sustained and held not erroneous, where the bill makes it apparent that such course will tend to prevent loss to the parties interested in the property. In the opinion heretofore filed the court assumes that the application for the appointment of a receiver in this case should be regarded as in the nature of a motion in the attachment suit already pending rather than an application made in a new suit in equity. It would doubtless be permissible to treat the application in this way if the filing of the complaint of the Severance Mercantile Company against James O'Marr and others, the issuance of summons thereon and the service or appearance of the defendants, therein cannot be regarded as the institution of an action. But wherein is there any thing lacking to constitute this proceeding an ordinary action in equity? What is required to be done to institute suit beyond the filing of the complaint and issuance of the summons? And what is essential to give the court jurisdiction of the proceedings beyond this, and the service upon the defendants or their voluntary appearance? We see no necessity for treating the application for the appointment of a receiver as a motion made in one of the prior attachment suits, and there are certainly serious difficulties in regarding it as such, since Phelps was not a party to the attachment suit instituted by the Severance Mercantile Company, nor was the latter a party in the Phelps attachment suit. It is not a new thing for one court to take action in aid of proceedings in another, as in the appointment of ancillary receivers. (Beach's Modern Equity Practice, § 713. See, also, the *Wabash cases*, 22 Fed. Rep. 272; 23 Fed. Rep. 514; 29 Fed. Rep. 618; 145 U. S. 82, 105; *Phinizy* v. *Augusta K. N. R. Co.*, 56 Fed. Rep. 275; *Decker* v. *Gardner*, 124 N. Y. 334.)

DE WITT, J.—The question of the discretion of the district court is not before us, so it may be considered as a conceded fact that it was properly shown to the district court that the sheep were in danger of suffering material loss and injury if left in the hands of the sheriffs, and that the appointment of a receiver would tend to avoid this loss and injury.

We will turn our attention for a moment to one matter which we meet at the threshold of this case. It seems that the Severance Mercantile Company filed a complaint, and commenced a separate action, asking to have this receiver appointed. It is objected that there is no such thing known as an action for the appointment of a receiver, but that such appointment is ancillary to another action; that is, an action of such a nature that a receiver may be appointed therein. (*French Bank case*, 53 Cal. 495; *Jones* v. *Bank of Leadville*, 10 Col. 464.) But perhaps it would be fair to regard what appears to be a complaint of the Severance Mercantile Company against the New York Sheep Company, Phelps, and the two sheriffs, as simply a petition or application of the Severance Mercantile Company, looking to an appointment of a receiver in the case which was already pending in the district court, namely, the Severance Mercantile Company against the New York Sheep Company. We are willing at least to so regard the situation of the parties. Then, the question of discretion not being under review, it remains to be decided whether, under the facts shown, the court had jurisdiction to appoint this receiver; that is to say, the question is this: If two creditors each sue one and the same debtor on simple money demands, and each creditor sues out in his case a writ of attachment, under which writs two sheriffs of different counties levy upon property of the debtor in their respective counties, then has the court jurisdiction to appoint a receiver of the property so attached and held by such sheriffs?

It is also conceded, of course, that the showing was made of danger of loss and material injury. Stated more simply, the proposition perhaps may be reduced to this: In an action on a simple money demand, for a plain money judgment, in which action property has been attached, has the court power to appoint a receiver of the attached property, if it appears that there is danger that it will be materially injured?

The statute—quoting the portion which is pertinent, or which was relied upon by respondent—is as follows: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor

to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured. . . . . 6. In all other cases where receivers have been heretofore appointed by the usages of courts of equity." (Code Civ. Proc., § 229.) Counsel for the respondent said that he relied partly upon the sixth subdivision of the section. But it is scarcely seriously urged that the appointment of the receiver was justified by that subdivision of the section, or that receivers have heretofore been appointed by the usages of courts of equity in a simple law action on debt. The California supreme court said, in reference to this subdivision, as follows: "The five subdivisions containing such specifications are followed by the sixth, which provides for the appointment where 'receivers have heretofore been appointed by the usages of courts of equity,' which expression we may conceive to be equivalent of that employed in the third subdivision of the one hundred and forty-third section of the former Practice Act—'such cases as are in accordance with the practice of courts of equity jurisdiction.' Either of these expressions simply means that, in addition to the particular instances mentioned in the preceding subdivisions, the appointment should be made by the district court, as a court of equity, in the other suits in which the power could have been employed had there been no statute on the subject, and cannot be construed as authorizing the appointment in an action at law." (*Bateman* v. *Superior Court*, 54 Cal. 285.)

Counsel for respondent next urge that authority for this appointment is found in subdivision 1 of section 229. Before proceeding to read that subdivision, we remark, in passing, that there is some argument of expediency as to the making of the appointment of the receiver in this case as well as in, perhaps, other actions of debt where there are numerous attachments of property. That argument should, of course, be addressed to the law-making department of the government, and cannot be seriously entertained by a court when it stands

in the face of plain language of a statute. We have examined our statute with some assiduity in search of the power of the district court to make this appointment, for we believe that the discreet exercise of such a power would sometimes be beneficial; but we cannot find the power given by the law. But the attachment law is not unmindful of the care and disposition of the attached property. A bond must be given by the party attaching. (Code Civ. Proc., § 182.) The sheriff is under the duty to "safely keep" the property. (Code Civ. Proc., § 184.) The sheriff is an officer of the court, and subject to the court's proper orders. Again, if it appear to the court that the interests of the parties will be subserved by a sale of the attached property, the court may, upon determining such fact upon a hearing of both parties, order the property sold as property is sold under execution. (Code Civ. Proc., § 541.)

We will then proceed for a moment to analyze the statute. Turning again to subdivision 1, section 229, it is observed that the first sort of case in which a receiver may be appointed is in an action by a vendor to vacate a fraudulent purchase of property. This, of course, may be passed without comment. Next, we find that a receiver may be appointed in an action by a creditor to subject any property or fund to his claim. We should be inclined to say that this might be passed without comment, were it not that counsel for the respondent has relied upon it. We therefore examine it a moment. The action here was a simple one of debt. Surely it cannot be contended that a simple action of debt, asking only a straight money judgment, is an action by a creditor to subject property or a fund to his claim. The action is not for such a purpose. It does not seek such relief. There is nothing about such an action which looks to an obtaining of the relief of subjecting a fund or property to the plaintiff's claim. Nor does the fact that a writ of attachment was issued change the nature of the action from a money demand to one for the relief of subjecting a fund to plaintiff's claim.

Again, it has been suggested that the following portion of subdivision 1, section 229, is sufficient to grant the power to the district court. The portion reads as follows: "A receiver

may be appointed, ... in an action . . . . between partners, or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." But no partners are concerned here, and no other persons jointly owning any property or funds. Omitting these words, the statute, for the purposes and facts of this case, would read: "A receiver may be appointed . . . . in an action . . . . between persons jointly interested in any property or fund, on the application of," etc. Does this portion of the section give authority to appoint a receiver of property attached in a simple money demand action? We do not think such view should obtain. Is the action between persons jointly interested in any property or fund? It seems not. The action has nothing to do with property of any one, or of any kind. No property is the subject of litigation. The action is upon a debt only, and seeks only a money judgment. The plaintiff and defendant in such an action are not jointly interested in any property or fund, so far as any thing appears in the action. It is true that when the action was commenced a writ of attachment was issued ancillary thereto, and in pursuance to such writ property was seized by the sheriffs, to be by them held to answer any judgment that plaintiff might obtain. Does this ancillary circumstance inject into the action the fact that the action is between parties jointly interested in property or a fund? It does not seem to us that it does. The action not being about property at all, the issuance of an attachment does not change the nature of the litigation, and convert it into an action between persons jointly interested in any property. We think the section means that the action must be in regard to property in which the parties are jointly interested. The whole context indicates this. The context speaks of "between partners" and "others jointly owning" and "others jointly interested." It is actions between such people that are being described. We think the section certainly means that the action here described, in which a receiver may be appointed, is one in regard to property or a fund in

which there is a joint interest of the parties. The only possible construction by which this portion of the section could be made to apply to such an action as the one before us is the holding that the creditor and debtor, plaintiff and defendant, in an action on a money demand, and for a simple money judgment, are "jointly interested" in property which is not the subject of the action, but is confessedly the sole property of the defendant, and in which the plaintiff has no rights whatever except what rights it may be held that he obtains by virtue of the fact that the sheriff has seized said property under writ of attachment; that is to say, it must be held that an attaching creditor has a joint interest, within the contemplation of the statute, with defendant in defendant's property which has been attached. We do not think that such plaintiff has such joint interest as is contemplated by the statute. We do not think the statute, in its text and context, conveys this meaning. The plaintiff, by attachment, has acquired a right to have the property held by the sheriff awaiting the judgment, but we cannot think that he has such a joint interest in the property as this statute had in view when it spoke of partners and other persons jointly owning or interested in any property. If the legislature had intended to give the power to appoint a receiver in attachment suits it is such an important matter that it would seem that they would have mentioned it.

The California supreme court said, as to a kindred subject: "If it had been intended to confer the power to appoint an officer of that character [a receiver] in an action at law for the recovery of the possession of real property, it is not credible that the legislature would not have said so in terms, since it was apparent that it was their purpose to specify all cases, whether at law or equity, in which receivers could be appointed." (*Bateman* v. *Superior Court*, 54 Cal. 289.) The court was construing a statute similar to our own. Therefore, upon such analysis as we are able to give subdivision 1 of section 229 of the Code of Civil Procedure, we cannot find therein the jurisdiction to appoint the receiver in this case.

There seems to be nothing in the further portion of the subdivision which is applicable. The rest of the language states

on whose application the receiver may be appointed. The section has already stated the kinds of action in which the appointment may be made. These we have considered. Then it states on whose application, and under what circumstances, the appointment may be made in such actions. The appointment may be made "on application of the plaintiff," or it may be made on the application "of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable." (See the section, with subdivision 1, quoted fully above.) The statute, in this latter language, is not defining actions in which the receiver may be appointed. That it has done. Now it comes to defining who may make the application, and it says not only the plaintiff, but any party whose right, etc., is probable. If this part of the section which we are now considering does not relate to the first part of the section, and if it does not simply describe the persons who may apply in the sorts of action which have been before set forth; and if this portion is to be cut off from the proceeding; and if it is to stand alone as describing another condition when a receiver may be appointed, then the reading would be about as follows: "A receiver may be appointed in any action on the application of the plaintiff, or of any party whose right, etc., is probable, where it is shown that the property is in danger of material injury," etc.; that is to say, this construction would give the authority to appoint a receiver in any case where it was shown that there was danger of material injury to property. It may be expedient to have such a statute. It seems that Indiana has one as broad as this. (20 Am. & Eng. Ency. of Law, 59.)

But we do not think that subdivision 1 of section 229 would bear that construction. If such were the meaning of the statute, the word "or" would have been inserted before the word "on," at the top of page 116 of the Compiled Statutes, at the eighth line of the section. And the section would have read, in effect, that a receiver may be appointed in an action by a vendor to vacate, etc., or by a creditor to subject, etc., or between partners or others jointly interested, etc., "or" (this being the "or" that would have to be inserted) on the application of plaintiff, or of any party, etc., upon the danger of the

material injury shown. But the statute does not read in that way. The "or" as written in quotation marks in the above sentence is not in the statute. The section describes the sort of actions in which the receiver may be appointed, with the disjunctive "or" between the different sorts, and then goes on and states who may make the application in such actions, and under what circumstances in such actions. The section closes with the statement that to allow a receiver in the cases enumerated it must appear, furthermore, that there is danger of loss, etc. This clause of the section is introduced by the word "and," connecting it with the language preceding it, which is the language describing who may make the application in the cases which have been theretofore set forth. The descriptions of the sorts of actions in which the receiver may be appointed are all connected with the word "or," and not "and." This last clause of the section speaks of "the property or fund." The natural construction seems to us to be "the property or fund" which the section has theretofore mentioned. We do not think it is within the meaning of the section to cut off this last clause, and read it: "A receiver may be appointed in an action 'where it is shown that the property or fund is in danger of being lost, removed, or materially injured.'" Such a clause, so read, would be meaningless, for there would be nothing in it to indicate the nature of the action, or what was "the property or fund" referred to.

We cannot see any other reading of the statute than that which we have above pointed out, and such reading does not include the appointment of a receiver in such a case as the one before us. This does not seem to us to be construing the statute at all. It seems to be nothing further than reading its plain terms.

We are of opinion that this writ of *certiorari* should be granted, and that the order of the district court in appointing the receiver should be annulled.

PEMBERTON, C. J., concurs.

HARWOOD, J. (dissenting).—I dissent from such a narrow and rigid construction of the provisions of our remedial statutes

relating to the administration of justice in civil actions as will compel courts of original jurisdiction to permit damage and waste of property in *custodia legis*, by pursuing rigidly and inflexibly a certain method of administration, while such waste could readily be avoided without detriment to the rights of any litigant or others interested, but with advantage to all, by employing another well-known and usual method of custody and administration of the things involved in the litigation.

In the foregoing treatment it is conceded that by holding the attached property in the custody of several sheriffs, and without change of situation, great loss would be involved, which could be avoided by placing the property in the custody of a receiver. It has been the practice of trial courts for a long period in this jurisdiction to appoint a receiver in such a case, and put him in charge of the property attached and held under various attachment liens, where the conditions were such as to entail injury and loss if such method were not pursued.

The code provides in very broad and general terms that a receiver may be appointed in cases where partners "or others" are "jointly owning, or interested, in any property or fund, on the application of plaintiff, or of any party whose right to, or interest in, the property or fund, or proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." (Code Civ. Proc., § 229.) In the face of this provision, and the further provisions of the code that all its provisions must be liberally construed, so as to work out substantial justice, and in the face of the conceded fact that unless the court interposes a receiver in this case great loss would result, and in view of the showing that the appointment of a receiver therein would avoid such loss and work great advantage to all parties concerned, still it is held by a majority of this court that no receiver can be appointed in such a case. In order to reach that conclusion it is unavoidably held by implication that attaching creditors who have by regular proceedings levied attachment liens upon property of their debtor, and who have a clear right (subject only to other direct liens in advance of theirs) to the funds or proceeds arising from such property, still have no "right or interest in" the property attached, "or

probable interest in the funds arising therefrom," in contemplation of the statute providing for appointment of receivers. If we were applying a provision of the Criminal Code, under the more rigid and technical rule applicable to the interpretation of criminal statutes, I hardly see how we could reasonably confine the broad and general language of the statute under consideration to such narrow limits.

ON REHEARING.

DE WITT, J.—Counsel on the argument on rehearing seem to have obtained the impression that the original decision was based upon the ground that the receiver should not be appointed because there was another adequate remedy. Whatever was said as to the creditor's rights and remedies under his attachment was simply a suggestion to meet counsel's argument *ab inconvenienti*. But the question of the expediency of giving the courts power to appoint a receiver in certain plain money demand actions is a matter to be addressed to the legislature, and not to the courts. In the original opinion we endeavored to make a plain, simple reading of the statute as to receivers. Reading that statute in whole, and not in part, we cannot find any authority to appoint the receiver in this case. As we remarked in the original opinion, such power might be beneficial in some cases. That subject we commend to the legislature, where only it belongs. It is ordered that the original decision shall stand.

PEMBERTON, C. J., concurs.

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order dissolving the attachment is pending and undetermined.—*Martin* v. *Maxey*, 85.

4. It is the duty of a sheriff who has levied an attachment upon a stock of goods, and has in his possession thereunder the books of account of the defendant, to garnish those who appear therein as debtors, without first receiving a written notice from the plaintiff or his attorney, as provided for in section 188 of the Code of Civil Procedure, since sections 184, 185, and 186 require a sheriff, when a writ of attachment is placed in his hands, to attach and safely keep all the property of the defendant, including debts.—*Montana Milling Company* v. *Jeffries*, 143.
5. It is not error for the trial court to permit an attachment, plaintiff to amend his complaint and affidavit on attachment, without an affidavit showing ground therefor, and pending a motion to dissolve, where the amendment does not affect the substantial rights of the parties.—*Muth* v. *Erwin*, 227.

ATTACHMENT OF BOATS.

The filing of a demurrer by a judgment creditor of a boat in an action brought to subject it to claims for services, and in which the creditor assumes to act and appear for himself alone, does not constitute an appearance of the defendant boat under section 216 of the Code of Civil Procedure, providing that any person interested in a boat that has been attached may appear for the defendant and conduct the defense.—*Dietrich* v. *Steam Dredge and Amalgamator* 261.

ATTORNEY IN FACT.

Fraudulent Conveyance by, see FRAUDULENT CONVEYANCES, 1, 2, 3.

ATTORNEYS.

Proper service of statement on motion for new trial, see NEW TRIAL, 2.

Fees of, in action on injunction bond, see INJUNCTION, 1.

Fees of, provided for in promissory note, when not recoverable, see NEGOTIABLE INSTRUMENTS, 2.

Proof of fees on mortgage foreclosure. See EVIDENCE, 3.

Where an attorney made an agreement to try a case for his client in the justice court for $25, and another to try it in the district court for $25, and a third to appeal it to the supreme court for $25, which several amounts he received, performing only the first two services and deliberately neglecting to take the appeal, and during the time within which he might have appealed procured and converted $23 which had been paid into court for his client on the judgment from which he agreed to appeal; and also opened a letter addressed to another client, which had been sent in his care, containing a check for $100, upon which he indorsed his client's name, and procured the money, which he refused to pay over upon demand, although having no claim or lien upon it for fees or otherwise—such conduct is ground for disbarment under sections 106, 107, 5th division of the Compiled Statutes vesting the supreme court with power, in its discretion, to disbar an attorney for malconduct in his profession, and also for refusing, upon demand, to pay over money to which his client is entitled. *State ex rel. Benton* v. *Baum*, 12.

BILL OF EXCEPTIONS.

Not necessary to review order denying change of venue, see APPEAL, 2.

BOARD OF MEDICAL EXAMINERS.

See PHYSICIANS AND SURGEONS.

professional men, where the tax bears equally upon all persons of the classes named.—*City of Bozeman* v. *Cadwell*, 480.

CONTEMPT.

Imprisonment for, in failing to pay alimony, see MARRIAGE AND DIVORCE, 6.

CONTRACTS.

1. An agreement in a building contract to "provide and furnish all material and do all labor" is not fulfilled unless the material and labor are paid for by the contractor.—*Cockrill* v. *Davie*, 131.
2. An engagement as a "supply teacher" at seventy dollars per month for a term of ten months, and plaintiff's acceptance thereof cannot be construed as a contract by which plaintiff was to receive a salary of seventy dollars a month for the entire term without regard to whether she actually rendered any services or not, but rather that plaintiff was to be paid for the time she taught at the rate of seventy dollars per month, it appearing that plaintiff was only called upon to teach several days during the first four months, and that during that time she made no demand for such salary, though knowing that the regular teachers were paid at the close of each school month, nor any inquiry as to the understanding of the trustees in respect to her compensation; there also being evidence that during the first month of the term she applied for appointment as a regular teacher in one of the schools of the district for which the salary was seventy dollars per month.—*Case* v. *School District No. 3, Missoula County*, 138.
3. A delinquent subscriber to a fund for the construction of an opera-house is liable in an action brought to enforce payment of his subscription without proof on the part of the plaintiff that some liability was incurred pursuant to defendant's repeated promises to pay, made subsequent to his subscription, where the action was based, not upon such subsequent promises, but upon his original subscription.—*Thomas Kane and Company* v. *Downing*, 343.
4. Evidence that when a delinquent subscriber signed a subscription list the cost and character of the building contemplated was fully explained to him, and that the trustees proceeded with the completion of the enterprise, relying upon the subscription of defendant and others, is proper where defendant pleaded that his subscription was intended for a less expensive enterprise.—*Id*
5. A contract by which plaintiff, in effect, agreed to procure testimony that would win a lawsuit for defendant, for which services he was to receive a commission upon the amount recovered, is void as against public policy and as tending to impede the administration of justice.—*Quirk* v. *Muller*, 467.

COSTS.

Imprisonment for in criminal prosecution, when improper, see CRIMINAL LAW, 9.

COUNTERCLAIM.

Maturing after action commenced, cannot be pleaded. See PLEADING, 2.

COUNTIES.

When a portion of one county is attached to another county, the last assessment on the territory so attached may be ascertained by reference to the assessment books of the former county in determining the classification of the latter county as established by the assessed valuation of property within its boundaries. *State ex rel Herford* v. *Cook, State Auditor*, 201.

CREDITOR'S BILL.

A creditor's bill to enforce a judgment lien against property claimed by defendants under a judicial sale need not be preceded by proceedings supplementary to execution, as such summary process is applicable to the discovery of property subject to execution, concealed or withheld by the debtor or others in collusion with him without pretense of substantial right, and not to cases where the attitude of the parties to the property in controversy is fully understood. *Ryan* v. *Maxey*, 81.

CRIMINAL LAW.

Conviction for practicing medicine without a license, see PHYSICIANS AND SURGEONS, 4.

Duplicity in indictment, see INDICTMENT, 1.

Indorsement on indictment, see INDICTMENT, 2.

New trial, grounds for, see NEW TRIAL, 9, 10, 11, 12, 13, 14.

1. A conviction for an assault is amply sustained by evidence from which it appeared that one W. was attempting to do hauling over a road crossing defendant's mining claim; that the road was not public, but that defendant had given one M. a license to make or use it; that defendant had excavated a shaft some three or four feet deep across the road, rendering it impassable for teams; that W. and his men, upon arriving at the shaft with loaded teams, commenced to fill it up; that, as defendant testified, he was struck with rocks thrown into the hole by W.'s men; that W. and another man beat him, and, upon being pursued and seized, he fired his revolver, endeavoring to shoot under W.'s arm; that, as W.'s party testified, defendant tried to fire some giant power when they began shoveling into the shaft; that W. knocked the light from defendant's hand; that defendant then pulled a revolver and threatened to kill W., and shot him when but a few feet away.—*State* v. *Donyes*, 70.
2. Evidence in the case at bar that the teams of the prosecuting witnesses could not turn out and go past the shaft which defendant was digging was admissible as part of the *res gestæ* to show the immediate surroundings at the time of the assault, and was not objectionable as an attempt on the part of the state to justify a trespass.—*Id.*
3. Cross-examination of one of W.'s men as to his intention to cross the mining claim against defendant's will was properly excluded, as such intention on the part of the witness would not be evidence of a similar intention on the part of W.—*Id.*
4. A notice of location of defendant's mining claim was admissible on behalf of the defendant in showing his intention in going upon the ground and making the excavation, but was properly excluded as testimony offered in justification of an assault by defendant with intent to murder a person coming upon the claim. (*State* v. *Smith*, 12 Mont. 378, cited.)—*Id.*
5. Objections to testimony and alleged error in permitting certain questions upon cross-examination, when no reasons for such objections are pointed out, or any showing that such questions were prejudicial to defendant, will not be reviewed on appeal.—(*City of Helena* v. *Albertose*, 8 Mont. 499, cited.)—*Id.*
6. Defendant's offer in evidence of the record of an action in which the court refused to restrain him from felling trees across the road where the assault occurred was properly refused, since an undisputed ownership by defendant of the premises in question would not justify him in repelling a trespass by an attempt to murder.—*Id.*
7. Evidence that on a former occasion defendant repelled a bare trespass by another only a short distance from the place of the present assault by the use of a deadly weapon, and also threatened to kill future trespassers, together with the record of his prosecution and conviction for that offense, was admis-

sible on behalf of the state for the purpose of showing the intent and object of defendant in being upon the premises armed as he was at the time of the assault.—*Id.*

8. The approval by the court, pending a motion for a new trial and for a stay of execution, of a bond conditioned for the defendant's appearance and obedience to all orders of the court does not by implication stay execution of the sentence, and the defendant may be lawfully imprisoned pending the determination of the motion for a new trial.—*State ex rel Marion* v. *Reynolds*, 383.

9. When costs of prosecution are required by the statute, under which a conviction is had, to be included in the fine assessed, the defendant may properly be imprisoned under a judgment including such cost as part of the fine. (*State* v. *Sullivan*, 9 Mont. 494, cited.)—*Id.*

10. A judgment upon conviction in a criminal case which provides for punishment by fine and imprisonment is not void in that it further provides that the fine shall be enforced as a civil judgment.—*State* v. *Marion*, 458.

11. Maintaining a common-law nuisance is not punishable by both fine and imprisonment, as the penalty therefor upon conviction is limited by the express terms of the statute (Crim. Laws, § 162) to a fine of not more than one thousand dollars, and such offense is therefore not within the operation of section 278 of the Criminal Laws providing generally for imprisonment as a penalty for common-law misdemeanors not otherwise provided for in the Criminal Laws.—*State ex rel Hendricks* v. *Seventh Judicial District Court*, 452.

12. When the punishment of a particular offense is specially limited to a fine such provision is paramount to a general provision which designates imprisonment as a penalty for a class of offenses within which is included the particular offense.—*Id.*

13. A complaint for violation of an ordinance imposing a license tax upon lawyers is not objectionable in that it charges that defendant transacted the business or profession of a lawyer, or in failing to charge that he followed his profession for a compensation, or that he was a lawyer of any pretensions whatever. *City of Bozeman* v. *Cadwell*, 480.

14. An admonition by the court to the jury in a murder trial not to permit themselves to be prejudiced against the defendant by a certain occurrence during the trial, but to determine the question of guilt or innocence solely from the evidence, is not an instruction as to the giving of which orally error could be assigned.—*State* v. *Osnes*, 558.

15. On a trial for murder, testimony by a witness that she knew the defendant, and that he came to her house four or five days before the murder with men whom defendant wanted her to assist in robbing, telling her they were lately from Norway, is admissible in rebuttal where the defendant had denied being at her house at that time with the deceased, and had testified that the only time he was at her house during the month with two men was early in the month, while the killing occurred on the last day of the month.—*Id.*

16. Where defendant and another stole a steer from the herd of one owner, and about an hour after stole a cow from the herd of another owner, driving both off together, the stealing of each animal was a complete and independent offense, and an acquittal as to the theft of the steer is not a bar to a prosecution for the theft of the cow. Nor is the defense of an *alibi*, established upon the trial for larceny of the steer, *res judicata* that defendant was not present when the cow was stolen.—*State* v. *English*, 399.

17. Confessions by an accomplice in crime not made in the presence of the defendant, nor during the commission of the offense or in its furtherance, and not part of the *res gestæ*, are inadmissible against the defendant.—*Id.*

As against grantor of mining claim, see MINES AND MINING, 2.

1. Where a demurrer has been interposed to a complaint upon several grounds, embracing objections to form as well as to the merits, and is sustained generally, and the pleader abides by his pleading, and suffers judgment, such judgment does not estop the same party in another action, between the same parties or their privies, where it neither appears by the record, or by extraneous evidence, that the demurrer in the former action was sustained on consideration of the merits; and in the absence of such showing, it will be presumed to have been sustained for defects of form rather than upon each of the several grounds alleged.—*Kleinschmidt* v. *Binsel*, 81.
2. A wife who administers upon the estate of a husband, to whom she supposed she was lawfully married, and returns as belonging to him property which he had purchased with her money, wrongfully taking the title in his own name, and allows the same to be set apart by the court as her homestead, is not thereby estopped from asserting an equitable title to the property as against the lawful wife seeking to enforce a dower right therein.—*Rausch* v. *Rausch*, 325.

EVIDENCE.

In prosecution for assault with intent to kill, see CRIMINAL LAW, 1, 2, 3, 4, 5, 6.
As to what may be shown as part of the *res gestæ* in assault cases, see CRIMINAL LAW, 2.
As to contemporaneous agreements, see BOND, 1.
In action to recover delinquent subscription, see CONTRACTS, 4.
Newly discovered, as ground for new trial, see NEW TRIAL, 12, 13.
Confession of accomplice, admissibility, see CRIMINAL LAW, 17.
In rebuttal, what admissible in homicide case, see CRIMINAL LAW, 15.

1. Section 264, division 5, of the Compiled Statutes, providing that an instrument or conveyance that is lost or not within the power of the party wishing to use the same may be proved by a copy certified by the recorder, being special in its character, controls section 839 of the Compiled Statutes, making certified copies of all papers filed in the office of the recorder *prima facie* evidence in all cases, which is a general statute, and, therefore, upon the proof of title in ejectment the admission in evidence of certified copies of conveyances, without proof of loss or inability to produce the originals, is error. (*Flick* v. *Gold Hill and Lee Mountain Min. Co.*, 8 Mont. 298, cited; *McKinstry* v. *Clark*, 4 Mont. 370; *Garfield M. & M. Co.* v. *Hammer*, 6 Mont. 53, reviewed and modified.)—*Manhattan Malting Co.* v. *Sweteland*, 269.
2. The introduction in evidence of the record of the probate court reciting the execution and delivery by the probate judge of a deed of a lot, accompanied by testimony of the grantee's attorney that he placed the deed in his safe at the request of the grantee; that his office was afterwards burglarized and the deed and other papers abstracted from the safe, and that he had on several occasions made diligent but unavailing search in his office, and also at the grantee's house and other places to find said deed, constitutes a sufficient foundation for proof of the contents of such lost deed. And such sufficient foundation being laid, testimony by such attorney that the person who robbed the safe confessed to having burned all the papers, while objectionable as hearsay, would not be ground for reversal.—*Brooks* v. *Jordan*, 375.
3. Testimony by an attorney of ability and experience as to what would be a reasonable attorney's fee for foreclosing a mortgage, which is elicited upon a statement to him of the character of the case and the amount involved, is proper, and in such inquiry the witness may be asked on cross-examination for what compensation a competent lawyer could be procured to prosecute

such an action on behalf of his own client.—*Grand Opera House Company* v. *McGuire*, 558.

EXECUTORS AND ADMINISTRATORS.

1. The doctrine of equity that a trustee shall not be permitted to make any profit by the use of trust funds does not warrant the creation of a resulting trust in favor of an heir, in lands which an executor has purchased, using trust funds to the extent of one-half the purchase price, where, punctually and as directed by the will, he accounted for the funds so used with compound interest.—*In re Ricker's Estate*, 158.
2. Where the administration of an estate continues over a period of years, an executor may properly charge the estate at the close of each year, with the commission allowed by law on funds of the estate, actually disbursed during the preceding year. (*In re Dewar's Estate*, 10 Mont. 426, distinguished.)—*Id.*
3. Where an executor has compromised a claim due the estate after collecting some payments from time to time from the debtors, who were generally regarded as insolvent, he should not be charged with the amount rebated from the debt upon the mere showing that for several years during the running of the debt title to certain land stood in the name of one of the debtors, and which property was conveyed for a consideration, as stated in the deed, much larger than the amount of his indebtedness to the estate, it not appearing that such property was subject to execution, or that the consideration in the deed represented the value.—*Id.*
4. An executor who has retained in his hands funds of the estate which should have been deposited in bank at interest, should not be required, in an equitable accounting, to pay arbitrary rates of interest upon such funds in excess of the statutory rate, particularly where he accounted for a higher rate than the banks, wherein the money was ordered deposited, would have paid.—*Id.*
5. A judgment recovered against an administrator in another state is of no binding effect as against an administrator of the same intestate in this state, nor is it evidence of a debt, and therefore cannot be pleaded as a part of plaintiff's cause of action in a subsequent suit on the same demand against the administrator appointed in this state. Nor is it necessary to plead such judgment in order to show that the demand sued on in this state had been given credit for a sum realized under the foreign judgment.—*Braithwaite* v. *Harvey*, 208.
6. An administrator has no authority to act or bind the estate outside the jurisdiction of his own state, and, therefore, where he has defended a suit in another state in the name of the administrator appointed in that state, he is not estopped from disputing the claim upon which the action was brought when sued thereon in his own state.—*Id.*
7. The allowance of a claim against an estate and its approval by the district judge under section 154 of the Probate Practice Act, providing that every claim so allowed and approved must be ranked among the acknowledged debts of the estate and paid in the due course of administration, does not render such claim a final judgment so as to protect it from attack by protest against the allowance of the administrator's final account. (*Ryan* v. *Kinney*, 2 Mont. 454, distinguished. HARWOOD, J., dissenting.)—*In re Mouillerat's Estate*, 245.
8. A creditor whose claim against an estate may be reduced by the allowance of an alleged debt is a person interested in the estate, and may contest the administrator's final account under section 265 and 267 of the Probate Practice Act, providing that on the day appointed for the settlement of the account any person interested in the estate may appear and contest the same. (HARWOOD, J., dissenting.)—*Id.*

9. Creditors of an estate may, upon the settlement of an administrator's final account, contest an allowed claim as barred by limitation, since under section 156 of the Probate Practice Act no claim must be allowed by the administrator which is barred by the statute of limitations.—*Id.*

FINDINGS.

By jury in divorce suit, see MARRIAGE AND DIVORCE, 3.
Inconsistency of, effect, see APPEAL, 1.
Inconsistency of, in water right case, see WATER RIGHTS, 4.
Failure to except to, not ground for dismissal of appeal, see APPEAL, 12.
Of jury in equity case, not binding upon the court, see EQUITY, 1.
As to procedure between mechanic's lien and mortgage, see APPEAL, 4.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. The lessor of a lot upon which the lessee had erected a building under a lease providing that all improvements put upon the premises should become forfeited upon default in payment of rent for sixty days, cannot, after refusing a tender of two months' rent, upon the express ground that rent for three months was due, maintain an action for forcible entry against the defendant to whom the lease had been transferred, where it appeared that immediately after refusing the two months' rent he had placed two men within the building during the temporary absence of the defendant who had occupied the house during the preceding night and that day until one o'clock, when he went out for dinner, and who upon returning had forced his way into the house and turned out the men, since the plaintiff had acquired no peaceable possession at the time of defendant's entry; and had the two months' rent been accepted there would have been no sixty days' default under which a forfeiture of the building could have been declared.—*Milligan* v. *Cuff*, 366.
2. The mere fact that lessor of premises had given permission to the lessee's mortgagee to remove some furniture from an upper story and store it in a lower room, after such permission had been refused by the lessee's agent, does not establish such a possession as to enable the lessor to maintain an action for forcible entry.—*Id.*

FORMER ACQUITTAL.

Not a bar to second prosecution where different animals are stolen, see CRIMINAL LAW, 16.

FRAUD.

Representations in sale of goods, when not fraudulent, see SALES OF PERSONALTY.
By attorney in fact in making conveyance, see FRAUDULENT CONVEYANCES, 1, 2, 3.
Sufficiency of answer alleging, in foreclosure, see PLEADING, 4.
In inception of promissory note, as a defense against indorsee, see NEGOTIABLE INSTRUMENTS, 1
Sale of firm property by one partner not constructive fraud as to the other, see PARTNERSHIP, 1.

FRAUDULENT CONVEYANCE.

1. A conveyance will be set aside as fraudulent, where it appeared that the plaintiff had, at the instance of one brother-in-law, appointed another brother-in-law her attorney in fact, and that the latter had then conveyed her interest to the former for a grossly inadequate consideration, which was accepted by plaintiff in ignorance of the facts, she having reposed entire confidence in them, and having no other source of information, and they, acting in collusion, had concealed from her the value of the property, and falsely represented the title to be in litigation, and the property to become a source of expense, while in fact

it was yielding considerable revenue, and its title virtually unassailable.—*Leggatt* v. *Legatt*, 104.

2. A claim of equitable ownership of such property by the defendant, he alleging to have originally conveyed it to plaintiff's husband as security for a loan, is contradicted by evidence that the property was purchased by him from defendant for several thousand dollars; that thereafter he had for several years paid his proportion of the expense of annual representation, which expense also included items for personal services by defendant, and that defendant, in his letters to plaintiff, referred to plaintiff's interest as "your interest" in the property, and at the time it was conveyed to plaintiff by her husband through defendant he asserted no claim to it.—*Id.*
3. Evidence that defendant immediately after purchasing the property had written to plaintiff, informing her of the sale, and referring to lawsuits affecting the property, saying, "The third interest I bought from you I deeded to Alex for a loan of two hundred dollars, which I sorely needed," and thereafter had sent her a portion of the money, which she received and retained for several months without repudiating the sale, although in possession of letters from defendant, tending to show that he was not the equitable owner of her property, is insufficient to show a ratification of such sale by plaintiff with full knowledge of the facts.—*Id.*

GARNISHMENT

Duty of sheriff on attachment of book accounts, see ATTACHMENT, 4.

HABEAS CORPUS.

Certiorari in aid of, in case of unauthorized imprisonment, see CERTIORARI, 1.
Will not lie to review order requiring payment of alimony, see CERTIORARI, 2.

INDICTMENT.

1. An indictment, drawn under section 261 of the Criminal Laws, prohibiting the sale of liquors in any place where women are employed or allowed to assemble for the purpose of the business therein carried on, which charges the sale of liquor where women are both employed and allowed to assemble, is not void as charging two offenses.—*State* v. *Marion*, 458.
2. An indictment against two persons, upon which is indorsed the name of only one, is not bad under section 150 of the Criminal Practice Act, requiring certain indorsements on the indictment, but not providing that the title of the case shall be indorsed in full.—*Id.*

INJUNCTION.

1. In an action upon an injunction bond the fact that plaintiff became liable for attorney's fees in the injunction suit is sufficiently shown by proof that he employed an attorney who procured a dissolution of the injunction, and of the reasonable value of his services.—*Cook* v. *Greenough*, 352.
2. A verdict for expenses in procuring a dissolution of an injunction, in excess of what were actually proved, is improper, and should be remitted to the amount warranted by the evidence or a new trial granted.—*Id.*

INSTRUCTIONS.

Admonition by court to jury, when not an oral instruction, see CRIMINAL LAW, 14.

INTEREST.

Rate of, chargeable against executor, see EXECUTORS AND ADMINISTRATORS, 4.

INTERVENTION.

A party who is a stranger to a suit as commenced, but who without a showing by complaint or obtaining leave of court, appears upon his own motion and demurs to the complaint, is not an intervenor within section 24 of the Code of Civil Procedure, and his demurrer so filed may be properly disregarded by the trial court.—*Dietrich* v. *Steam Dredge and Amalgamator*, 261.

JUDGES.

Remarks of, in presence of jury as ground for new trial, see NEW TRIAL, 14.

A judge who had been attorney for an administratrix is not disqualified to try a proceeding brought by certain creditors of the estate to remove her, under section 547 of the Code of Civil Procedure, providing that a judge shall not act as such where he has been attorney for either party in the action or proceeding. Nor does the mere fact that he has an allowed claim against the estate disqualify him from trying such proceeding.—*State ex rel McCormick* v. *Woody*, 455.

JUDGMENT.

Failure to enter, as a defense in action on bond, see SURETIES, 1.
On demurrer, as an estoppel, see ESTOPPEL, 1.
On pleadings, order granting not appealable, see APPEALABLE ORDER, 1.
Lien of, bill to enforce, see CREDITOR'S BILL, 1.
Foreign, against administrator, see EXECUTORS AND ADMINISTRATORS, 6.
Allowed claim against an estate not final, see EXECUTORS AND ADMINISTRATORS, 8.
For fine and imprisonment, validity, see CRIMINAL LAW, 10.

1. Refusal of the district court to order a judgment entered *nunc pro tunc* as of the date of its rendition is error where the records disclose what the judgment was, and that it had actually been rendered.—*Parrott* v. *McDevitt*, 203.
2. Refusal to vacate a default judgment in a divorce case upon motion is an abuse of discretion where it appeared that defendant, who was a nonresident, immediately upon receiving the summons employed counsel where she lived, who at once wrote to a local attorney inquiring whether he would appear for defendant; that the latter appeared in the case, but, after securing plaintiff's acceptance of a compromise as to alimony which he understood he was authorized to offer on behalf of defendant, wrote that he would withdraw from the case unless such compromise was accepted by defendant; that defendant refused such proposed compromise by telegraph, and followed the same with letters explaining such refusal, but which were returned unopened; that upon receipt of such message he declined to file defendant's answer which he had in his possession, and which disclosed a meritorious defense; and, refusing to take further action, suffered the case to go by default. Nor would the merits of the motion be affected by the fact that the plaintiff had remarrried immediately after such judgment; the condition of the parties to such marriage not being of defendant's creation.—*Simpkins* v. *Simpkins*, 386.
3. Though a defendant may have a meritorious defense to an action the mere neglect of his counsel to file an answer in time, which neglect is neither explained or excused, is not a ground upon which a default judgment may be vacated under section 116 of the Code of Civil Procedure, providing that a party may be relieved from a judgment taken by mistake, inadvertence, surprise, or excusable neglect.—*Thomas* v. *Chambers*, 423.

JURISDICTION.

Of supreme court, to compel interstate railway to operate its line, see MANDAMUS, 1.
Of justice of the peace to vacate judgment rendered upon verdict, see JUSTICE OF THE PEACE, 1.

pendente lite is made where the plaintiff alleged a marriage with the defendant in Russia, and the birth of five children, and the defendant, while admitting the birth of four children as their lawful issue and long cohabitation, claimed that the marriage was invalid under the laws of that country; that plaintiff had been guilty of adultery, and that he had obtained a Mosaic divorce.—*Finkelstein* v. *Finkelstein*, 1.

2. Although defendant claimed that a large tailoring business, which he was alleged to own, belonged to another, the undisputed fact that he was conducting such a business is a sufficient showing of his ability to pay thirty dollars a month alimony and a counsel fee of fifty dollars.—*Id.*
3. Special findings may be properly submitted to and passed upon by the jury in a divorce suit, under section 275 of the Code of Civil Procedure.—*Morrison* v. *Morrison*, 8.
4. Habitual drunkenness, acts of violence, abuse, and frequent abandonment of a wife by her husband, during a period of several years preceding a final separation in January, 1889, are not condoned by a cohabitation together until October, 1888, when the defendant, shortly before the commencement of an action for divorce in April, 1889, while intoxicated had broke into plaintiff's house, armed with a pistol, and threatening to kill her drove her to seek refuge with a neighbor.—*Id.*
5. While neglect of a husband to support his wife is not a ground for divorce in this state, such neglect may be proved in an action for divorce sought upon the grounds of habitual drunkenness and extreme cruelty, when confined to showing the tenor of defendant's conduct towards his wife.—*Id.*

MECHANICS' LIENS.

1. In an action by subcontractors to foreclose a lien, proof that the owner paid the contractor without showing that the subcontractors received payment is insufficient to defeat the lien, as the owner in order to protect his property should have seen that the subcontractors were paid for their work within the contract price.—*Gould* v. *Barnard*, 335.
2. Under the provision of the mechanic's lien law (Comp. Stats., div. 5, § 1376), preserving to a lienor a right to the building or improvement superior to that of a prior mortgagee of the land, with right of removal within a reasonable time after a sale, a purchaser, who is in possession of premises under a sale upon the foreclosure of his lien, is entitled, as against the holder of a mortgage having priority to his lien as to the land, to remain in possession of the premises until the foreclosure of the mortgage without losing his right to remove the building. In such case the reasonable time within which the building or improvement should be removed is prior to the time when the lienor must yield possession of the land to the mortgagee under his foreclosure proceedings, but the removal should not be made until after the period for redemption allowed by law to the proprietor, as well as to the mortgagee, has expired.—*Grand Opera House Company* v. *McGuire*, 558.
3. A lien claimant does not lose his right to remove from the owner's land the building or other improvement upon which his lien has been enforced, by failing to claim such right upon foreclosure, and to have the decree provide for the removal of the building within a reasonable time. Nor would the lien claimant's right of removal be affected by the fact that the building was of brick or stone, the removal of which would involve great loss.—*Id.*

MEDICAL EXAMINERS.

See PHYSICIANS AND SURGEONS.

MINES AND MINING.

As to condemnation of private road across mine, see ROADS, 8.

1. It is not necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each twenty acres contained in a one hundred and sixty acre placer claim, which, under section 2330 of the Revised Statutes of the United States, may be located by one person or an association of persons.—*McDonald* v. *Montana Wood Co.*, 88.
2. Forfeiture of a placer mining claim for failure to do annual representation will not be sustained when such forfeiture is not pleaded, and no evidence is disclosed by the record of a relocation by any one on account of such failure, or that defendant had acquired an adverse outstanding title.—*Id.*
3. The statute of limitations does not commence to run against a mining claim until the issuance of a patent therefor. (*King* v. *Thomas*, 6 Mont. 409, affirmed.)—*Mayer* v. *Carothers*, 274.
4. Where town lots situated upon a patented mining claim are claimed by defendants through conveyances from one who assumed title thereto under an arrangement by which the residents of a mining gulch, at a meeting held for that purpose, resolved to lay off a townsite, and, among other things, provided that each person might take up two lots—the fact that one of plaintiff's grantors attended such meeting and took part in the proceedings, and another took up town lots pursuant thereto, does not create an equitable defense to an action of ejectment brought by the patentees of such claim to recover possession of the portions covered by the lots in controversy. (*Talbott* v. *King*, 6 Mont. 76, cited.)—*Id.*

MORTGAGES.

Rights of prior mortgagee as against lien claimant, see MECHANIC'S LIEN, 2, 3.
Proof of attorney's fees on foreclosure, see EVIDENCE, 3.

MOTION.

To vacate default judgment, see JUDGMENT, 2, 3.
For new trial, see NEW TRIAL.
To dissolve attachment, amendment pending, see ATTACHMENT, 5.

MUNICIPAL CORPORATION.

Liability in actions for negligence, see NEGLIGENCE, 1.
Ordinance of, imposing duties on building inspector, see NEGLIGENCE, 2, 3.
Ordinance of, imposing license tax on professional men, see CONSTITUTIONAL LAW, 2.
Ordinance of, prosecution under, sufficiency of complaint, see CRIMINAL LAW, 13.

NEGLIGENCE.

1. The negligence of the owner and driver of a private vehicle is imputable to one voluntarily riding with him by invitation and defeats the right of the latter to recover damages against a city for injuries caused by its negligence when such driver was guilty of contributory negligence.—*Whittaker* v. *City of Helena*, 124.
2. A city ordinance requiring a building inspector to inspect buildings in course of construction and to "see" that they are being constructed as provided by the ordinance imposes upon him the duty of enforcing from builders obedience to its requirements, and for a neglect of this duty he is liable in damages to one who sustains injury by the fall of a building constructed in a careless and grossly negligent manner.—*Merritt* v. *McNally*, 228.

3. In an action for damages against a city officer for negligence of a duty prescribed by ordinance, an objection to the complaint that it does not show that the officer had the means of enforcing the provisions of the ordinance will not be sustained on demurrer, but the sufficiency of such want of means as a defense may be determined upon an answer.—*Id.*

NEGOTIABLE INSTRUMENTS.

1. A plea of fraud in the inception of a promissory note constitutes a *prima facie* defense to an action by an indorsee against the maker, and places upon the plaintiff the burden of proving, and therefore of pleading, *bona fides*, which includes a want of knowledge of the alleged fraud.—*Thamling* v. *Duffey*, 567.
2. Attorneys' fees provided for in a promissory note in case its payment be enforced by an action at law are not recoverable in an action by the maker to compel payment of the amount of the note by one who had assumed and agreed to pay it, and who did pay it after the commencement of such suit.—*Galvin* v. *Mac Mining and Milling Co.*, 508.

NEW TRIAL.

Order denying, time for appeal from, see APPEAL, 8.
Order granting, when not reversed, see APPEAL, 5.

1. Failure to object to extensions of time beyond the statutory period for the settlement of a statement on motion for a new trial, offering amendments, and joining in the settlement thereof without objection, operates as a waiver of the lapse of time for the service of the statement.—*Walsh* v. *Mueller*, 76.
2. A notice and statement on motion for new trial need not be served on all the attorneys of certain of the respondents, when attorneys representing all the respondents were properly served.—*Id.*
3. Where the time for filing a statement on motion for a new trial, or for doing any act of court practice, is extended "to" a certain date, the date named is included within the period prescribed.—*Penn Placer Mining Co.* v. *Schreiner*, 121.
4. A statement on motion for a new trial will not be disregarded because amendments thereto are not engrossed in the record, but occupy a separate position at the close of the statement, where such amendments comprise additional matter which is complete and intelligible in itself.—*Id.*
5. Motion to strike from the record the statement on motion for a new trial because the evidence was not all reduced to narrative form denied in this case. *Id.*
6. A statement on motion for a new trial which was not filed after settlement as required by subdivision 3 of section 298 of the Code of Civil Procedure will not be stricken from the record on appeal where it was filed with the clerk before settlement, used upon the hearing of the motion, and thereafter remained as a file of the court.—*Sell* v. *Graves*, 341.
7. A statement on motion for a new trial will not be stricken from the record upon the alleged ground that it was not presented to the judge who tried the case, or delivered to the clerk for the judge to settle and sign within ten days after service of the proposed amendments, where it appeared that after the statement and amendments thereto were filed both were presented to the judge and settled in the presence of respective counsel.—*Id.*
8. The appearance and taking part in the settlement of a statement on motion for a new trial by counsel for respondent constitutes a waiver of objection to the sufficiency of appellant's notice of intention to apply for the settlement thereof.—*Id.*
9. A new trial, sought upon the ground of alleged misconduct of a juror in using

improper language in the jury-room, is properly denied when such misconduct is attempted to be shown by the affidavit of a third person to whom the juror had stated the circumstance, particularly where the use of the language is denied by the affidavit of the juror himself and six of his fellow-jurors.—*State* v. *Anderson*, 541.

10. An expression by a juror, after a verdict of guilty, to the effect that if defendant got a new trial and was turned loose he would shoot him like a dog, cannot be taken as proof, on motion for a new trial, that he had an opinion and was prejudiced when impaneled as a juror, where the juror, by affidavit, states that the feeling so expressed was formed upon hearing the evidence on the trial.—*Id.*

11. The denial of a motion for a new trial, based upon *ex parte* affidavits, to the effect that a juror had stated before the trial that defendant was a tough citizen, and that he had made the unqualified assertion that defendant ought to be hung, but without giving any details, or the context of the conversation, and there being nothing to indicate what affiant's notion of the word "unqualified" was, cannot be held to have been an abuse of discretion, where the juror had testified on his *voir dire* examination that he had no prejudice against defendant and had formed or expressed no opinion as to his guilt or innocence, and was absent from the state so that his counter-affidavit could not be obtained upon the hearing of the motion.—*Id.*

12. Newly discovered evidence is not ground for a new trial where its only tendency is to contradict testimony, given by a witness for defendant, to the effect that defendant had given him details of the killing at a time in the night when only a participant could have known of them, and which was the only notice he had received that night, by showing that he had received information of the crime on the same night from another person.—*Id.*

13. A new trial in a capital case will not be granted upon the ground of newly discovered evidence which consists of an unsworn statement to the judge, made by an accomplice, to the effect that the defendant was innocent, that he had committed the murder himself, and that he had lied on the trial, where such statement was made after the state had accepted his plea of guilty in the second degree and shortly before the date set for defendant's execution, and was inconsistent with the facts otherwise proved in the trial, there being no showing that his testimony on the second trial would be different from that given on the first.—*Id.*

14. Where the court provoked by the obstinancy of the defendant upon a trial for murder fined him with some display of temper for refusing to answer a proper question on cross-examination, but afterwards, when the defendant answered the question, upon advice of his counsel, remitted the fine and admonished the jury not to permit themselves to be prejudiced thereby, such occurrence is not sufficient to authorize a new trial upon the ground that the court abused its discretion to the prejudice and injury of the defendant. *State* v. *Osnes*, 553.

NONSUIT.

See TRIAL.

NOTICE.

Notice to a firm of the assignment of a debt due by it is sufficiently shown by proof that the assignee left with the person in full charge of the firm's business a written order for the claim which was retained by such person with an understanding of the situation, so as to give such assignee priority over a creditor of the assignor who garnished the firm after such notice. But *quære*, was proof of such notice material.—*May* v. *Hill*, 338.

PARTNERSHIP.

1. A sale by one partner of a large portion of the firm property for the purpose of paying firm obligations, the proceeds of the sale being devoted to that purpose, though made without the concurrence of the other partner, but with his knowledge that a sale was contemplated, cannot be avoided as a constructive fraud at the suit of the nonconcurring partner, upon the mere showing that the vendee knew of the latter's interest in the property and want of consent, where the price paid was the full market value and the sale was highly beneficial to the interests of the firm.—*Waite* v. *Vinson*, 405.
2. Where one partner seeks relief in equity from an alleged fraudulent sale of partnership property made by the other partner without his consent, where a fair price was obtained and the proceeds devoted to the liquidation of the firm obligations, he must first do equity by tendering to the vendee the price which he paid for the property. (*Maloy* v. *Berkin*, 11 Mont. 138, cited.)—*Id.*

PHYSICIANS AND SURGEONS.

1. The refusal of the trial court to stay proceedings upon an appeal from a judgment revoking the license of a physician to practice his profession will not be disturbed on appeal in the absence of an abuse of discretion; nor will this court in such case upon motion stay the operation of such judgment pending review on appeal.—*Board of Medical Examiners* v. *Kellogg*, 243.
2. While a complaint in proceedings instituted before the state board of medical examiners to revoke a physician's license must set forth facts which constitute an offense pleadings must not be too strictly construed nor should too close observance of the science of pleading be required.—*State ex rel. Baldwin* v. *Kellogg*, 426.
3. Revocation of a physician's license for unprofessional, dishonorable, and immoral conduct cannot be sustained upon a complaint which merely charged that on a given date the defendant placed in a furnace a headless fœtus, about seven months old, with intent to destroy the same and conceal its birth; and that at the coroner's inquest over such fœtus he testified that the child was the result of a miscarriage, its head having become detached in delivery; that he would not disclose the mother's name, as she had requested him not to make it known, and that he had been advised that he need not disclose it; that he withheld it, not through fear of incriminating himself, but to avoid the publicity it would give the mother, but that he would give her name to the coroner the next day, who could use his discretion in the matter, while upon the next day he refused to give her name upon the ground that she had left the state, and without her presence to explain her condition at the time his answer might incriminate him, since neither the attempt to burn the fœtus nor the refusal to disclose the mother's name was of necessity either unprofessional, dishonorable, or immoral, but both were acts as consistent with innocence as with guilt. (HARWOOD, J., dissenting.)—*Id.*
4. A conviction for practicing medicine without a license will be set aside where it appeared that the defendant's license had been revoked by the state board of medical examiners and by the district court, and that defendant's conviction was had pending an appeal to the supreme court, which reversed the judgment of the district court revoking his license.—*State* v. *Kellogg*, 451.

PLEADING.

Forfeiture of mining claim, see MINES AND MINING, 2.
Complaint in action against city officer for negligence, see NEGLIGENCE, 3.
Complaint in action for damages for trespass, see DAMAGES, 1.
Complaint in action to set aside tax deed as a cloud, see TAXATION, 1.

Complaint in proceedings before medical examiners, see PHYSICIANS AND SURGEONS, 2, 3.

Complaint in assumpsit, see ASSUMPSIT, 2.

Answers alleging fraud in inception of promissory note, see NEGOTIABLE INSTRUMENTS, 1.

1. In an action to redeem from a chattel mortgage a complaint which alleges that after the maturity of the debt the assignee of the mortgagee took possession of the property and has ever since held possession, treating the same as his own and selling portions thereof, but which does not allege any facts showing that in taking possession defendant in any manner violated the terms of the mortgage or otherwise wrongfully converted the property, fails to show grounds for equitable relief.—*Crowe* v. *La Mott*, 355.
2. Under sections 89 and 90 of the Code of Civil Procedure, permitting a defendant, by answer, to plead an existing counterclaim as new matter constituting a defense, it is error for the court to permit defendant by amendment to plead a counterclaim maturing after the action is commenced.—*McGuire* v. *Edsall*, 359.
3. In an action upon a lease a defense that defendant was merely a tenant from month to month is not inconsistent with a defense that by reason of acts and omissions of the plaintiff, amounting to an eviction, defendants were compelled to remove from the premises.—*Kline* v. *Hanks*, 361.
4. An answer by the vendee of mortgaged premises to an action to foreclose the mortgage and to obtain a deficiency judgment against him, under a clause in the deed providing for the assumption of the mortgage debt, which avers that such clause was fraudulently inserted, and that defendant's agent had no authority to accept a deed containing such a provision, states a good defense, without alleging the tender of a deed back to his grantor upon discovery of the fraud.—*Sweetser* v. *Diehl*, 498.

PRIOR APPROPRIATIONS.

Of water, rights acquired by, see WATER RIGHTS, 2.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

Need not precede creditor's bill, see CREDITOR'S BILL, 1.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC POLICY.

Contract to procure testimony to win a lawsuit, void as against, see CONTRACTS, 5.

RECEIVERS.

1. Under subdivision 1 of section 229 of the Code of Civil Procedure, authorizing the appointment of a receiver in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property to his claim, or between partners or others jointly interested in any property, on application of the plaintiff or of any party whose interest in the property is probable, and where the property or fund is in danger of being lost or materially injured, the district court has no jurisdiction, in actions for debt in which the debtor's property has been attached, to appoint a receiver of the property so attached, on the application of a junior attaching creditor, though it appears that the property may be lost or materially injured if left in the hands of the sheriff. Nor would the court in such case possess jurisdiction to appoint a receiver under subdivision 6 of said section 229, authorizing such appointment "in

all other cases where receivers have been heretofore appointed by the usages of courts of equity." (HARWOOD, J., dissenting.)—*State ex rel New York Sheep Company* v. *Eighth Judicial District Court*, 577.

2. An action for debt in which the defendant's property has been attached is not an action by a creditor to subject any property or fund to his claim, nor is it an action between persons jointly interested in any property or fund, and is therefore not within subdivision 1 of section 229 of the Code of Civil Procedure, authorizing the appointment of a receiver in the cases stated where the property or fund is in danger of being lost or materially injured. (HARWOOD, J., dissenting.)—*Id.*

3. The kinds of action in which a receiver may be appointed under subdivision 1 of section 229 of the Code of Civil Procedure are limited to an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property to his claim, or between partners or others jointly interested in any property, and the concluding language of the provision, "on the application of the plaintiff or of any party whose right or interest in the property is probable, and where the property is in danger of being lost or materially injured," cannot be construed as creating new cases for a receiver, but merely provides on whose application, and under what circumstances, the appointment may be made in the cases already enumerated.—*Id.*

RES JUDICATA.

Judgment on demurrer as constituting, see ESTOPPEL, 1.
In respect to defense of alibi, see CRIMINAL LAW, 16.

ROADS.

1. In an action to enjoin the opening of a road through plaintiff's land it is no objection to the validity of the proceedings laying out the road that, as finally ordered opened, it deviated somewhat from the description in the petition therefor.—*Crowley* v. *Board of Commissioners of Gallatin County*, 292.

2. A resolution by a board of county commissioners ordering a road opened in accordance with their order, appointing as a board of viewers three persons "who possess the statutory qualifications," is a sufficient record in their proceedings that the viewers appointed were qualified "as householders of said county," as provided by statute.—*Id.*

3. The validity of proceedings to open a road are not affected by the fact that two of the viewers appointed to act in such proceedings are related to each other; nor by the fact that one of such viewers was a petitioner for the opening of the road, since the action of the viewers being merely advisory, the party complaining may demand that the question of damages be submitted to a jury, and also has the right of appeal.—*Id.*

4. It is no objection to such proceedings that the width of the proposed road was not designated in either the report of the viewers or the order opening the road, since the width of all public highways being fixed by statute, such width prevails where the proceedings are silent upon that point.—*Id.*

5. In the absence of statutory requirements as to citizenship of petitioners for the opening of a road, it is not necessary that the commissioners find in their proceedings that the petitioners were citizens of the United States or of the county, or to make findings in detail of facts, the recording of which is not required by statute.—*Id.*

6. Upon the trial of an action to enjoin the construction of a county road alleged to have been opened without compliance by the county commissioners with the statutory requirements that the petition for laying out the road be accompanied by an affidavit of posting notices; that the posting of notices by the viewers appointed be proved by an affidavit filed in the county clerk's

office, and that such viewers file a report with the said clerk, the mere absence from the files of the clerk's office of such affidavits and report does not prove that no such proofs or report were produced before the board of commissioners when it acted upon the petition and report; nor would the absence of such affidavits from the files establish an averment that no such notices were posted, and where plaintiff offered no further proof of such alleged omissions a nonsuit should be granted.—*Garron* v. *Clark*, 301.

7. Though proof of the posting of notices of the time of meeting of road viewers in proceedings to open a road is required to be made by affidavit filed in the office of the county clerk, the testimony of a witness that he actually posted the notices is admissible where the affidavits are absent from the files.—*Id.*

8. The provisions of section 15, article III, of the constitution that the necessity for, and the damages occasioned by, the opening of private roads shall first be determined by a jury, does not abrogate sections 1495 et seq. of the general laws, granting to the owners of mining claims a right of way across the claims of others, and providing for the assessment of damages by commissioners, but merely modifies the statute as to the method of determining the damages, leaving the jurisdiction and procedure in other respects unchanged.—*State ex rel. Coleman* v. *District Court of Third Judicial District*, 476.

RULES OF COURT.

Compliance with, as to appeals, not jurisdictional, see APPEAL, 11.

SALES OF PERSONALTY.

Of partnership property by one partner without consent of copartner, see PARTNERSHIP, 1, 2.

A finding that goods were not obtained upon a fraudulent statement as to the vendee's financial condition, is supported by evidence that shortly prior to the sale the vendor had, after examining the vendee's financial condition, agreed to compromise an existing indebtedness at fifty cents on the dollar, and to extend future credit, which compromise was finally effected at the time of making the statement, and purchasing the goods in controversy.—*Ellison* v. *Barker*, 96.

SCHOOLS.

Construction of teacher's contract, see CONTRACTS, 2.

SHERIFFS.

Duty of, in attachment of book accounts, see ATTACHMENT, 4.

STATUTE OF LIMITATIONS.

In respect to claims allowed by an administrator, see EXECUTORS AND ADMINISTRATORS, 10.

In respect to mining claims, see MINES AND MINING, 8.

Letters from the defendant to a third person in which he referred to plaintiff's claim, saying: "If I do not hear from you soon I will tender amount due . . . whatever is due is ready . . . . whenever I can safely pay you or plaintiff. I am not satisfied about the settlement. . . . . Please write me your understanding of it"; also, "if I settle with your folks, if they will see me clear of plaintiff," contain no definite, unqualified acknowledgment of plaintiff's demand or promise to pay the same, and are, therefore, insufficient to remove the bar of the statute of limitations.—*Braithwaite* v. *Harvey*, 208.

STATUTES.

Construction of, requiring surviving partner to settle partnership affairs, see ATTACHMENT, 2.

Construction of revenue act of 1891 as to tax lien on personalty, see TAXATION, 3.

Construction of, relating to punishment for common law nuisance, see CRIMINAL LAW, 11.

Construction of general and special, see CRIMINAL LAW, 12.

Construction of, relating to appointment of receivers, see RECEIVERS, 1, 2, 3.

SUBSCRIPTION TO FUND.

Liability of delinquent subscriber, see CONTRACTS, 3, 4.

SUPPLEMENTARY PROCEEDINGS.

Need not precede creditor's bill, see CREDITOR'S BILL, 1.

SUPREME COURT.

Jurisdiction of, to compel interstate railway to operate its line, see MANDAMUS, 1.

SURETIES.

1. An objection by the sureties on an appeal bond, that the judgment from which the appeal was taken had never been entered, and that the bond was therefore void, comes too late when urged for the first time in defense to an action upon the bond, where the bond recited an entry of the judgment, which was affirmed on appeal after counsel for both sides had appeared, no motion having been made to dismiss the appeal as premature, and the execution of the judgment had been stayed for over two years by virtue of such appeal bond.—*Parrott* v. *Kane*, 23.
2. Sureties on a stay bond cannot maintain in bar to an action instituted by the plaintiff in ejectment to recover damages caused by a stay of execution of a judgment in his favor by virtue of such bond, that the damages occurred by reason of an order of the district court recalling a writ of restitution which it had issued upon a *remittitur* from this court affirming such judgment, and staying all proceedings thereunder, and which order was still in force, where the writ was stayed pending the action on the bond and not upon any grounds affecting the validity of the judgment.—*Id.*
3. A surety upon an appeal bond cannot maintain in bar to an action upon the bond that his cosurety was in reality the principal, and that he had signed the bond upon the agreement of such cosurety to save him harmless, and that the plaintiff, knowing said facts, had compromised with his said cosurety for one-half of the obligation, and released him from further liability.—*Lay* v. *Nixon*, 64.
4. Sureties upon a bond cannot escape liability upon the ground that their principal did not sign it as it was understood he should, where the liability of such principal is already fixed by contract or by operation of law. (*Wibaux* v. *Grinnell Livestock Co.*, 9 Mont. 154; *Hoskins* v. *White*, 13 Mont. 70; *Woodman* v. *Calkins*, 13 Mont. 363.)—*Cockrill* v. *Davis*, 131.
5. In an action against a surety on a bond which the principal failed to sign, the plaintiff is not obliged to show an express understanding by the surety that the bond should be delivered and have effect without the principal's signature, where the principal's liability is already fixed by another contract.—*Id.*
9. In an action against two sureties on a bond where the action was erroneously dismissed as to one, this court will, on an appeal by the surety against whom judgment was rendered, reverse the order of dismissal, and modify the judgment, by providing that it shall not determine the right of the appellant to

enforce contribution of his cosurety, and that the case may be opened at the instance of either the plaintiff or appellant to determine such cosurety's liability on the bond.—*Id.*

TAXATION.

Constitutionality of ordinance requiring license tax of lawyers, see CONSTITUTIONAL LAW, 2.

1. A complaint in an action to set aside a tax deed as a cloud upon plaintiff's title, which avers an irregular assessment of the property in controversy and its subsequent sale for unpaid taxes, but which does not allege some injustice or injury to plaintiff resulting from such assessment, or that plaintiff has paid, or offers to pay, the taxes for which the property is properly chargeable, fails to state a cause of action for equitable relief.—*Casey* v. *Wright*, 315.
2. A tax sale of plaintiff's town lots, in connection with others, for the gross amount of taxes due upon all is void.—*Id.*
3. The general and comprehensive revenue act of 1891 which gives an express lien for taxes upon real estate, without mentioning personal property, and which repeals all acts or parts of acts inconsistent with its provisions, though apparently intended to cover the subject of levy and collection of taxes, cannot for that reason be interpreted to repeal by implication the lien for taxes upon personal property given by section 2 of the revenue act of 1887.—*Barden* v. *Wells*, 462.

TENDER.

Of deed to grantor, when not necessary upon discovery of fraud, see PLEADING, 4.
Of purchase price must be made by partner seeking to vacate sale by copartner, See PARTNERSHIP, 2.

TOWNSITE OF HELENA.

Although certain lots were not laid off and platted by a certain survey as part of the original townsite of Helena this fact did not render such lots open to appropriation and entry as public land, where the *locus in quo* was within the townsite as entered and patented by the probate judge.—*Brooks* v. *Jordan*, 375.

TRESPASS.

Treble damages for the cutting of timber on plaintiff's land, and its conversion by defendant, are not recoverable under section 363 of the Code of Civil Procedure in an action for willful and malicious trespass, in the absence of proof of malice, wantonness, or evil design.—*McDonald* v. *Montana Wood Company*, 88.

TRIAL.

Objections to testimony, sufficiency of, see CRIMINAL LAW, 5.
Findings of jury in equity case not binding upon the court, see EQUITY, 1.
Challenge to the array, see JURORS, 1.

1. Where an equitable defense is pleaded to an action of ejectment, and the court peremptorily directs the jury to find for the plaintiff, such direction is, in effect, a nonsuit of defendant's defense, and, therefore, whatever defendant's testimony tends to prove as to such defense must be taken as proved. (*McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15; *Creek* v. *McManus*, 13 Mont. 152, cited.) *Mayer* v. *Carothers*, 274.
2. After the overruling of a motion for nonsuit plaintiff's case is entitled to any support supplied by the evidence offered on behalf of the defendant. (*Sweeney* v. *Great Falls etc. Ry. Co.*, 11 Mont. 531; *McKay* v. *Montana Union Ry. Co.*, 13 Mont. 15.)—*Gould* v. *Barnard*, 335.
3. On the trial of an action to recover rent it is error for the court to direct the jury to find for the plaintiff when there is evidence tending to support a defense

that defendant did not enter the premises in question under a lease for years, but merely as a tenant from month to month.—*Kline* v. *Hanks*, 361.

TRUSTS.

Resulting, when not created by use of trust funds, see EXECUTORS AND ADMINISTRATORS, 1.

UNDERTAKING.

On appeal, defense to action on, see SURETIES, 1, 2, 3.

WATER RIGHTS.

1. The abandonment by the appropriator of a water right of a ditch through which he formerly diverted the water does not constitute an abandonment of the water right, or any part thereof, where he actually used the water appropriated, but from time to time diverted the same through different ditches.—*Kleinschmidt* v. *Greiser*, 484.
2. The claim of a prior appropriator of water is not cut down by the claim of a subsequent appropriator to an amount sufficient to irrigate the land which the former actually had under cultivation at the time of the latter's appropriation, but he is entitled to so much of the water originally appropriated as was necessary to irrigate such lands as he then had which were available for the production of crops.—*Id.*
3. A decree determining the rights of prior and subsequent appropriators of water should provide that each appropriator should have the amount to which he is entitled at the point where his ditch taps the creek.—*Id.*
4. In an action to determine priority of water rights findings that a defendant became entitled to his right by an appropriation at a given date that plaintiff had obtained a right to a less amount of water by a later appropriation, and that plaintiff had held the amount of such appropriation through adverse possession as against defendant, are inconsistent, and will not support a judgment awarding plaintiff the amount of his later appropriation.—*Johnson* v. *Bielenberg*, 506.